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ABSTRACT

The Carnegie Endowment's International Migration Policy Program convened a study group to review and develop alternative approaches to the way foreign workers gain access to the United States through the employment-based immigration stream. This study, a product of that effort, focuses on the selection of people admitted under work-related categories of the U.S. immigration system. Chapter 1, "The Role of Immigration in a Changing U.S. Economy," shows the ways in which economic-stream newcomers have a positive influence on U.S. economic, social, and cultural institutions. Their energy and skills contribute disproportionately to American jobs and wealth. Figure 1-5 is entitled "Training and Immigration." However, the current employment-based immigration system described in Chapter 2, "Current U.S. Employment- Related Visa Categories," no longer guarantees that the United States will attract the kind of permanent and temporary workers the country needs. The system has become a bureaucratic nightmare that is focused on short-term goals. Section EB-1-2 deals with "outstanding professors and researchers." Section EB-2 deals with "Immigrants with Advanced Degrees or Exceptional Ability." Chapter 3, "Alternative Models of Economic-Stream Selection: A Critique," outlines some other models for selection, the most effective being a point system to identify people likely to promote economic well-being. The point system models employed by Canada and Australia both use educational achievements in their selection criteria. "Revising Economic-Stream Selection To Promote U.S. National Interests," Chapter 4, proposes a point system that will provide broader and more meaningful protection for U.S. workers as it selects immigrants likely to succeed. (Contains 29 figures and 100 references.) An appendix lists the members and guests of the International Migration Policy Program's Study Group on the Selection of Skilled Immigrants (December 1993-June 1995). (SLD)

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BALANCING INTERESTS:

RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS

DEMETRIOS G. PAPADEMETRIOU AND STEPHEN YALE-LOEHR

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INTERNATIONAL MIGRATION POLICY PROGRAM

CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

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To the memory of
THOMAS M. BRUENING

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PREFACE

Despite repeated tinkering, the U.S. immigration system's organizing principles, most of its central tenets, and its basic architecture have changed little since 1965, or even since 1952, when two of the most thorough reviews of U.S. immigration laws took place. This is particularly true with respect to employment-related immigration. Yet, in view of the dramatic changes that have occurred during that period—changes in the global economy, economic and attendant social changes in the United States, and changes in the size, shape, and composition of the immigrant flow—the system cries out for thorough rethinking and reform.

Two years ago, the Carnegie Endowment's International Migration Policy Program convened a Study Group to review and develop alternative approaches to the way foreign workers gain access to the United States through the employment-based immigration stream—one of the three main streams by which immigrants legally enter the United States (the others being family-reunification and refugee admissions) and arguably the most contentious. The Study Group, comprised of key individuals from government, labor, business, and research centers,[1] as well as the intellectual author of Canada's current system for selecting employment-based immigrants, met on several occasions. At the first two sessions, the Study Group discussed an analysis of the United States' foreign labor certification process prepared by Thomas Bruening, the then-retired and now deceased chief of the U.S. Department of Labor (DOL) Foreign Labor Certification Division, to whom this report is dedicated. Those sessions were followed by an intensive two-day roundtable discussion with senior-level administrators of similar programs in Canada, France, and the Netherlands; a leading student of the United Kingdom's foreign labor recruitment system; the key Australian labor unionist on this issue; and senior-level program managers from the DOL and the Immigration and Naturalization Service (INS).

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[1] See p. 209 for the names and affiliations of the Study Group members.

Co-authors Papademetriou and Yale-Loehr, serving as the study group's conveners, also consulted independently with a broad range of knowledgeable government officials in the United States, Canada, and Australia, regional DOL program managers, independent researchers, practitioners, and legal experts. The resulting study also reflects the co-authors' own extensive experience with the issues.

Demetrios Papademetriou has been a student of immigration for more than twenty years. From 1988 to 1992, he was Director for Immigration Policy and Research at the U.S. Department of Labor (DOL), where he also chaired the Secretary of Labor's Immigration Policy Task Force. Immediately before joining the Endowment, he was one of three senior DOL officials who oversaw the drafting of DOL regulations to implement the Immigration Act of 1990.

Stephen Yale-Loehr, who has practiced immigration law for over a decade, is the former managing editor of *Interpreter Releases*, the principal immigration law newsletter. He also teaches immigration law at Cornell Law School. He is co-author of *Immigration Law and Procedure,* the leading immigration law treatise.

The combination of the co-authors' two-year research effort, the knowledge and guidance of the Study Group members, and the extensive international consultation process has resulted in the most thorough analysis of the U.S. foreign labor recruitment program ever attempted. The main goal has been to reflect on ways to reform the employment-based or, as it is called in the study, the economic immigration stream.[2] By devising a set of standards and a clear process (and, hence, predictable outcomes) for U.S. firms to select both permanent immigrants and "temporary" migrants (or "non-immigrants"), the study seeks to make economic-stream immigration the strongest possible contributor to the larger national effort of making the U.S. economy ever more competitive in the global economy.

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[2] This new designation better reflects the sharpened focus and emphasis of the study's proposals for choosing immigrants who can make stronger and longer-term contributions to both their employers and the U.S. economy.

The authors recognize that reforming legal immigration, particularly the employment stream, elicits much less agreement than controlling illegal immigration. Therefore, amassing the political resources needed to achieve legal immigration reform will be more difficult. Ultimately, however, the precise timing of reform is far less important than engaging the issue in a way that sets the stage for a thoughtful reconsideration of the employment-based immigration stream to make it put the U.S. national interest first.

The authors wish to thank members of the Study Group and its many guests for their thoughtful guidance and advice. The ground rules of the Study Group did not call for a consensus document; therefore, responsibility for the recommendations made—and, as it is customary to acknowledge, for any errors of omission and commission—rest with the authors.

The authors are also grateful to Patricia Blair, for her masterful editing; to Scott Came and Nikhilesh Korgaonkar for their research assistance; and to Yasmin Santiago for her tireless efforts at guiding the manuscript from inception to completion.

SUMMARY

In today's world—where capital, technology, products, and services move ever more freely across national borders—an individual's skills, education, and initiative have become among the most valuable economic resources. In tomorrow's world, their value will only increase. It is critical, therefore, that the United States have an immigration system that guarantees access to those who have these attributes and will put them to work for both the country and themselves.

This study focuses on the selection of people admitted under work-related categories of the U.S. immigration system. As discussed in Chapter 1, permanent and temporary "economic-stream" newcomers have a positive influence on U.S. economic, social, and cultural institutions. Their energy and skills contribute disproportionately to American jobs and wealth, especially since many of these foreign-born workers also invigorate international commerce and trade—vital components of economic success.

However, the current employment-based immigration system (described in Chapter 2) can no longer guarantee that the United States will attract the kind of permanent and temporary foreign workers it needs now and in the future. The system has become a bureaucratic nightmare and is only haphazardly related to broad U.S. interests. It focuses on short-term goals—i.e., filling jobs for which there is supposed to be a shortage of U.S. workers, though identifying such shortages is notoriously difficult—and relies heavily on intrusive, yet *ineffective,* government regulation to "protect" U.S. workers. The labor certification process, which forces government to perform burdensome and ultimately unsatisfactory case-by-case evaluations of whether a minimally qualified U.S. worker is available to fill a particular job, is particularly egregious. The system invites manipulation and abuse. There is universal agreement that it badly needs reform.

Chapter 3 outlines alternative models for admitting economic-stream immigrants. The most suitable for U.S. purposes appear to be variations of the point systems used by Canada and Australia to identify individuals who—on the basis of their age, education, language ability, work experience, and skills—are likely to promote economic well-being.

Chapter 4 proposes a modified point system (adapted to U.S. economic and labor market realities) that fashions an approach to economic-stream immigration that will serve the United States well into the next century. The proposed reforms would generally shift the focus to selecting permanent immigrants and key temporary foreign workers (some of whom are actually in a status akin to "pre-immigrants") more precisely on the basis of their promise for long-term contributions to the economy. Employers would continue to decide whom they want to hire, but they would choose from a pool of individuals who can pass certain requirements, including a points test. Employers would also be required to attest to certain recruitment, wage, and employment conditions to ensure a level playing field between U.S. and foreign workers. Numerical limitations would continue to be imposed, but the annual ceiling for a given year would be based on the previous year's actual usage.

Jurisdictional issues would be clarified, with the Immigration and Naturalization Service (INS) given broader responsibility on immigration matters. The hodgepodge of intrusive, often inconsistent government regulations would be simplified and emphasis would be placed on clear rules and predictable outcomes. The INS would be invested with the authority to administer admissions requirements more flexibly, while the Department of Labor, which would see its labor certification and related functions eliminated, would receive funds to upgrade its enforcement functions to better identify, isolate, and punish businesses that habitually violate immigration laws. Most visa functions now administered by the State Department's Bureau of Consular Affairs would gradually devolve to a new, specially trained corps of INS adjudicators.

The proposed reforms would generally provide broader and more meaningful protections for U.S. workers by imposing credible wage and work experience requirements that would eliminate preferences for immigrant workers because they are cheaper and limit competition for entry-level jobs. Certain temporary foreign workers would be limited to a three-year stay in the United States (rather than the six years sometimes permitted under the present system), and the use of "body shops" that supply foreign workers at below market rates would be strongly discouraged. Perhaps most important, the reforms would generally ratchet the requirements for work-related entry into the United States upward, so that immigrants would *create* even more jobs than they currently do.

In sum, the proposals set forth in this study will: (a) help U.S. businesses to remain competitive in the global economy by facilitating access to the best foreign talent; (b) help U.S. workers by increasing opportunities for more and better jobs while protecting them from unfair competition; and (c) help immigrants to get a fair return on their investments in their own skills and expertise. This approach has always been a large part of America's secret of success. It should continue to be so.

1. THE ROLE OF IMMIGRATION IN A CHANGING U.S. ECONOMY

As an institution, immigration has served the United States well—in fact, probably better than it has served any other country in the world. It has done so, however, only in part because of *who* has immigrated here. For the most part, the United States' success with immigration rests with what immigrants have found on their arrival and, more precisely, with the implicit "bargain" between them and their new country that set the terms of each party's expectations of the other.

THE IMPLICIT BARGAIN

In admittedly idealized form—there is massive *Sturm und Drang* associated with the history of U.S. immigration—the terms of the bargain between immigrants and their adopted country historically had at least four components:

- An often harsh, even Darwinian, economic environment that rewarded energy and hard work, initiative and risk-taking, deferral of gratification, and investments in human capital—expressed most frequently in the immigrants' commitment to the education of their children. Immigrants found, and came to expect, little assistance from the government, except for the creation of a mostly level economic playing field.[1]
- A legal environment that, with some notable exceptions, came to offer immigrants equality in virtually all social and

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[1] There are those who contend that this aspect of the bargain is changing, and that "rights" and "entitlements" may in some instances have supplanted "opportunity" as the foremost offer to newcomers. The policy challenge is to find a level of social welfare support commensurate with the society's broader interests that does not undermine the immigrants' incentive to succeed.

labor market regards and, over time, has come to combat actively institutional and even most personal discrimination, especially in its public forms. The law continues to defend these rights, in most instances with little regard for fluctuations in public attitudes toward immigration.

- A social and cultural environment that, for the most part, has come to appreciate the immigrants' commitment to family and hard work and their overall contributions to the enrichment of American culture and society—while usually being rather relaxed about, and at times even celebratory of, distinctness and diversity.[2]
- A political environment that generally welcomed and reached out to immigrants and involved them in schools, civic associations, labor unions, and other quasi-political activities well before they became formal members of the U.S. polity.

In other words, one of the critical differences between the environment that immigrants have faced in the United States and that encountered by immigrants virtually anywhere else is that immigrants to this country generally confront fewer legal and *institutional* obstacles[3] to translating their hard work, initiative, wits, discipline, and family values into extraordinary progress, often within remarkably short periods of time.[4] Of course, certain personal attributes (such as the bundle of skills an immigrant brings with him or her), characteristics (particularly race and, in certain instances, ethnicity), and the specific conditions of the host environment (such as the economic conditions at the place where the immigrant settles or labor/management relations at the place of employment) clearly affect both the speed and the overall probability of success.

For its part, late twentieth-century America, no less than the America of earlier times, has relied upon and greatly benefited from the presence of immigrants. Even in the 1950s, when fewer immigrants entered the United States than in any decade since, the U.S. economy may have been far less self-sufficient in terms of both talent and brawn than is generally acknowledged. Witness, for example, the very large *bracero* program for U.S. agriculture, which admitted between 300,000 and 400,000 Mexican workers a year throughout the 1950s, as well as the large-scale immigration from Puerto Rico, which had reached 430,000 by 1960 (*Centro de Estudios Puertorriqueños* 1979). The Puerto Ricans, who were not technically classified as immigrants, and the *braceros* came in addition to the more than 2.5 million foreigners who immigrated to the United States during the 1950s.[5] Furthermore, many of the public- and private-sector architects of the extraordinary growth of the U.S. economy in the 1950s and 1960s, as well as many of those on whose labor that economic miracle relied, were themselves the sons and daughters of earlier immigrants who, by the 1920s, made up strong pluralities of the country's workforce. In short, in addition to providing a crucial *identity-shaping* element to our society, immigration has been and continues to be both engine and fuel to our economy in activities that span the entire gamut of capital, knowledge, and technological content—from garment production and stoop agricultural labor to advanced research and development in every conceivable field.

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[2] A key indicator of how tolerant the society is of such distinctness is whether it is practiced in the public or private spheres.

[3] Other than those which are structural in nature and generally affect members of a racial or ethnic group, or of an economic or social class.

[4] There are many reasons for this phenomenon. Arguably, the most important ones revolve around the way political philosophy shaped the manner in which U.S. social, economic, and political institutions "organized" themselves both internally and in relation to each other to "reward" such attributes.

IF IMMIGRATION IS SO GOOD, WHY IS IT UNDER ATTACK?

Today the very concept of immigration is under strong attack. Initially, the attack focused on immigrants' (presumably unfair) competition with and displacement of U.S. workers. Critics have noted that the number of unskilled and semi-skilled jobs, while rising, has not kept pace with the growing ranks of low-skilled workers who are already in the United States—especially in the inner cities, where minorities, immigrants, and other disadvantaged populations are concentrated. They question the wisdom of admitting large numbers of low-skilled immigrants, presumably out of concern about further crowding of low-wage sectors. Some also question whether it is in the country's long-term interest to "subsidize" through immigration and other policy instruments (such as lax enforcement of labor and tax laws) the maintenance and expansion of low-wage, low-value-added activities, such as garment-making, which cannot compete in the long run with much more cheaply produced imported items.

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[5] The comparable figures stood at 3.3 million in the 1960s and 4.7 million in the 1970s. In terms of new immigration's share of the population, the figures for the three decades were 1.5, 1.6, and 2.0 percent, respectively, as compared with about 2.8 percent for the 1980s. The 1950s were the last decade in which Europeans constituted the absolute majority of all immigrants and, contrary to common understanding, Asians already made up about 6 percent of the immigration total despite the formal "exclusion" of most immigrants from that region (see INS 1994 for the relevant data).

This issue is much more complex than the standard displacement-by-immigrants argument, however—a perspective whose resonance intensifies exponentially during bad economic times. It is also enmeshed in the ruthless economic restructuring, consolidation, and downsizing that have been affecting even such heretofore relatively "recession proof" sectors as financial services, high technology, and defense. The resulting massive layoffs have created a pronounced sense of vulnerability and anxiety among social classes that never before had to worry much about economic security. Nowhere have these forces been felt more acutely than in California, which is the birthplace of the latest (as well as of most earlier) anti-immigration movements and continues to be a cauldron of anti-immigrant agitation.[6]

More recently, the attack on immigration has been fueled by anti-tax animus. Critics have targeted immigration's cost to state and local budgets, which incur most of the everyday burden of supporting the welfare (education and health) of immigrants and their families while the federal government receives most of the taxes that the wage earners pay. The problem is exacerbated in communities that include disproportionate numbers of "poor" immigrants, who pay few taxes to any jurisdiction. Some critics, especially in states where immigrants have tended to concentrate (California, Florida, Illinois, New Jersey, New York, and Texas), go so far as to blame immigrants for most local and state deficits. The attack was initially focused on the costs of providing services to *illegal* immigrants and their families, but it eventually converged on the fiscal "costs" of *all* immigration—an issue with which

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[6] By 1990, California's nearly twenty-year economic expansion and prosperity gave way to large-scale job losses throughout the economy, severe budgetary shortfalls, cuts in social programs, and, for a period of time in the early 1990s, a flight of human and physical capital—as well as to a widespread state of mind that can only be described as fearful and pessimistic.

"overburdened" taxpayers could identify and one that politicians could ride to success. A key aim of this budget-driven policy is to deny even legal immigrants who have not become citizens access to state and federal programs in which their participation is not explicitly mandated.[7]

The next mutation of the anti-immigration debate is already evident: Immigrant participation in programs not specifically intended for them (such as affirmative action) will be resisted. Lurking in the background are a host of other social and cultural issues—including language and education, even ethnicity and race—which threaten to grow in intensity.

Furthermore, the more the line between antagonism toward *illegal* immigration and general dissatisfaction with aspects of *legal* immigration begins to blur, the less manageable both issues become and the less likely it becomes that reform of legal immigration will meet even a modest "thoughtfulness" test. This blurring has become a *deus ex machina* for those who want to make deep cuts in legal immigration "unstoppable" by attaching them to an illegal-immigration control bill (see box **1-1**)—a legislative vehicle that enjoys broad bipartisan support.

All of this creates a serious dilemma for fair-minded observers who value immigration but who recognize the system's weaknesses and want to channel the energy the immigration issue is generating into *thoughtful* reform. There is a perception, for example, that several of the immigration system's processes can easily be circumvented by non-qualifying individuals and subverted by special interests. The system's unusual number of internal contradictions can be exploited as much by those who are trying to take advantage of the system as by those who seek to destroy it. Two of the permanent immigration system's components—the employment-based and refugee/asylum components—have been singled out for the most criticism in this regard, but several aspects of the temporary or "non-immigrant" system have similar programmatic weaknesses. Further-

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[7] It is true that working-class immigrants, like working-class people generally, can be "fiscal burdens" on the communities in which they live, because they have little or no property, little discretionary income, pay relatively few taxes, and require relatively large community services for themselves and their families. In some communities, large proportions of immigrants fall into this category for some period of time. *What this accounting fails to reflect, however, is that even the poorest immigrants make extraordinary economic contributions to their employers (who benefit from the lower price of the immigrants' labor) and to consumers (for whom product prices are kept lower through that same labor).*

1-1. THE CHALLENGE OF IMMIGRATION REFORM: CONTROLLING ILLEGAL IMMIGRATION

Immigration reform must start with an accurate assessment of the problem followed by a strategic vision about what needs to be done and a practical blueprint on how to do it. In that sense, it demands a chess player's approach, one that places the highest premium on deliberateness and the ability to operate on several fronts at once. The example of controlling illegal immigration demonstrates both the complexity of the issue and the combination of strategic thinking and action the issue requires.

Effective control of illegal immigration involves far more than merely trying to stop illegal border crossings or devising increasingly intrusive ways for preventing the employment of unauthorized workers—policy objectives that are extremely difficult to achieve in their own right. It also demands substantial funds for better enforcement of our laws, and for the systematic deployment of increasing amounts of diplomatic resources and intelligence and military assets (to identify, track, and stop organized smuggling efforts before they reach U.S. borders). Most importantly, it requires undertaking a concerted public education effort to change public attitudes about employing illegal immigrants, so that employing *only* those who have a legal right to work in the United States becomes *a respected new labor standard.* In other words, the practice of employing unauthorized workers must be stigmatized in the same way that violation of other labor standards, such as child labor or minimum wage laws, is stigmatized. Development and pursuit of these policies will require much more, *and more sustained,* energy that we have devoted to them even in the last two years. Only then will the goal of controlling illegal immigration stand a chance of becoming achievable.

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more, and more significantly for the focus of this study, policy analysts and others have come to realize that certain components of the immigration system may no longer serve broader U.S. interests as well as they should, or, for that matter, the interests of many of those who participate in it, including immigrants and their sponsors.

The present U.S. system for legal immigration is comprised of three broad selection "streams" (see table **1-2**): the economic stream, which covers immigrants chosen broadly for their human capital attributes; the social (and partly humanitarian) stream, which incorporates the family reunification categories; and the compassionate stream, which admits refugees and asylum seekers who meet certain internationally agreed criteria. Each of these streams reflects a different set of interests, values, and goals, and has both general and specific weaknesses.

Although we believe that the immigration system's basic architecture is fundamentally sound, our study lends support to the concerns of reform-minded critics. The following critique applies to the entire system:

- *The immigration system's precise policy intentions are unclear.* Despite some rhetoric focusing on specific (and usually narrow) policy aims, it is not clear what we seek to accomplish through many of our immigration policies. The problem goes beyond lack of conceptual rigor and internal consistency. The system and its administration also demonstrate an unnerving tendency toward inflexibility and a reluctance to adapt.
- *The system is grossly deficient in programmatic logic and transparency.* The system's regulatory and administrative procedures are not transparent enough to be easily understood by its clients. As a result, users cannot make reasonably accurate assessments about whether they meet specific program requirements or anticipate how long it will take to complete specific processes. Processes whose outcomes are not predictable contribute to avoidable system overload. They also invite manipulation and abuse.
- *It demonstrates extraordinary lapses in definitional integrity and consistency within and across categories.* Many of the immigration system's visa categories and provisions do not mean what most people would conventionally understand them to mean, and administrative rules often do not reflect what the visa categories, and the conceptual framework that supports them, imply.

- *It displays a resistance to change that goes beyond the inertia typical of large and bureaucratically complex systems.*
- *It is poorly financed by virtually any measure of comparison, and until recently it has been poorly managed, even mismanaged.*
- *Finally, it is extraordinarily cumbersome and intrusive without a commensurate benefit in either efficiency or effectiveness in meeting the system's stated objectives* (such as facilitating businesses' access to certain needed workers or "protecting" the interests of U.S. workers).

Notwithstanding widespread recognition of these shortcomings, Congress has not shown a sustained interest in exerting rigorous oversight of the execution of U.S. immigration laws, and the executive branch has typically shown even less will and capacity to exercise leadership on immigration policy. This is particularly remarkable when considering that immigration has always been a—if not *the*—principal ingredient of social, cultural, economic, and, increasingly, even political change in our society.

THE PARAMETERS OF REFORM

For fair-minded people—and we include ourselves—reform of immigration means giving priority to fashioning a framework for choosing immigrants that accomplishes what it says it seeks to accomplish, has predictable outcomes for its users, is responsive to the needs of U.S. business, is fair to U.S. workers, and is consistent with core national values and goals. Because we believe that discourse on these issues is crucial, both for the future of immigration and more broadly for stemming popular dissatisfaction with government in general, we join the discussion by preparing this study.[8] At the center of our approach is a single overriding objective: the effective management of a more purposeful and sharply focused immigration system.

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[8] There is an all too common tendency in the heated politics that surround immigration policy reform to attempt to portray discourse about the value of immigration itself as illegitimate. We reject such assertions. If such a discourse is to be productive, however, one of its key premises must be that most of those who are concerned about the system's failings are good and fair-minded people who are genuinely puzzled about immigration. They must wonder how certain provisions of such a defining American institution could be so poorly conceived and so poorly managed.

FOUR CRITICAL ELEMENTS

Proposals for change must meet four critical tests:

1. The changes must create a system that is demonstrably good for America. Meeting this challenge requires that attention be paid to two areas. First, we must admit family immigrants,[9] refugees, and asylum seekers on the basis of principles and procedures that stay true to our core social values and humanitarian principles *and* to our international legal obligations. Second, we must select economic-stream immigrants who contribute to the creation of American jobs and wealth and help to facilitate commerce and trade. This means that we must facilitate U.S. firms' access to people with human capital characteristics that will allow them to effectively operate in, and successfully adapt to, an always changing global competitive environment.

2. The system's provisions must meet the needs of U.S. employers without harming the interests of U.S. workers. This is a complex challenge that involves, among other things, two additional specific tasks. First, we must devise clear rules that allow U.S. firms to hire the most qualified job applicants in key occupations, who will make these firms more competitive in the global marketplace. The contributions of such workers generate up- and downstream economic benefits that best serve broad U.S. interests—and the interests of U.S. workers. Second, we must establish and enforce policies and procedures that eliminate *unfair* competition by economic-stream newcomers—whether such newcomers enter under the permanent or the temporary immigration systems.

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[9] The largest immigration component is family immigration, which is beyond the scope of this study. We fully support maintaining our national commitment to the social and humanitarian principles embodied in family reunification. Immigrants entering the United States on the basis of their family relationships reinforce our national commitment to strong family and work values while simultaneously contributing to positive social, economic, and cultural change and thus to their communities' welfare. In addition, families and fellow ethnics serve as social, cultural, and economic buffers and mediators between the individual immigrant and the host environment, making for a more effective transition into the new society. A successful transition, in turn, becomes a solid foundation for the success of the immigrants' children—the U.S. citizen-workers of the next generation. It is the success of that generation that sets us apart from most countries that engage in immigration. Furthermore, families provide services that research shows have a direct relationship to a household's successful economic integration (measured in terms of economic status). They provide information about and access to the labor market, a private social safety net, and assistance with child care that often allows several household members to work and thus contribute to the family's well-being. The provision of these and similar services is often central to the ability of immigrants to translate their educational and other qualifications into a timely economic adaptation (see Papademetriou et al. 1989).

1-2. Maximum Annual Legal Immigration (Excluding Refugees) under the Immigration Act of 1990

IMMIGRANT CATEGORY	ANNUALLY	
	1992-1994	Since 1995
FAMILY-SPONSORED ADMISSIONS		
Immediate Relatives of U.S. Citizens[a]	246,769	246,769
Family Preferences	minimum 226,000[b]	minimum 226,000[b]
• *1st Preference*	*23,400*	*23,400*
• *2nd Preference*	*114,200*	*114,200*
• *3rd Preference*	*23,400*	*23,400*
• *4th Preference*	*65,000*	*65,000*
Subtotal—Family Admissions	minimum 472,769	minimum 472,769
INDEPENDENT ADMISSIONS		
Employment-Based Workers (EB-1, EB-2, EB-3)	120,000	120,000
• *High Level Professionals [EB-1 and EB-2]*	*80,000*	*80,000*
• *Entry Level Professionals and Skilled and Unskilled Workers [EB-3]*	*40,000*[c]	*40,000*[c]
Special Immigrants/Religious Workers (EB-4)[d]	10,000	10,000
Investors (EB-5)	10,000	10,000
Subtotal—Independent Admissions	140,000	140,000

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Subtotal—Diversity Program (beginning in 1995):	—	55,000

TRANSITIONAL VISAS		
Adversely Affected Countries	40,000	
Employees of U.S. Businesses Operating in Hong Kong[e]	12,000	
Spouses and Children of Aliens Legalized under IRCA	55,000[b]	
Transitional or Miscellaneous[e]	2,000[f]	
Subtotal—Transitional Visas:	109,000	

GRAND TOTAL (EXCLUDING REFUGEES):	721,769	667,769

[a] Admission of immediate relatives is unlimited. The number reported for 1992 to 1994 represents the average annual number of such admissions during the three-year period. In the absence of a 1995 figure from INS, the number given is a "planning number" representing the average of annual admissions from 1992 to 1994.

[b] To accommodate the anticipated growth in the immediate relative categories without disadvantaging family preference immigrants, a floor of 226,000 visas was established for family preference immigrants. Any additional visas required to maintain this floor from 1992 to 1994 were subtracted from the 55,000 visas allocated annually to the spouses and children of those aliens legalized under IRCA. The actual number of visas offered in the family preference category is determined annually by subtracting the number of admissions under the unlimited immediate relative category *in the previous year* from a statutory maximum "Worldwide Level of Family Sponsored Immigrants"—465,000 from 1992 to 1994, and 480,000 beginning in 1995.

[c] The Immigration Act of 1990 limits the number of unskilled worker visas to 10,000 annually.

[d] This category includes certain religious workers, former employees of the U.S. government abroad, former employees of international organizations, and certain juvenile court dependents. The number fluctuates somewhat each year.

[e] Visas for these programs were actually issued from FY 1991 to FY 1993.

[f] These 2,000 visas were issued over the three year period from 1992 to 1994. Half of these visas went to displaced Tibetans; the other half went to aliens selected by the "adversely affected" country lottery in IRCA for whom no visas were available because of a bureaucratic miscalculation.

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3. Any changes must enhance the prospects for immigrants to succeed once they are here. As noted earlier, immigration implies a bargain between newcomers and the society that receives them—to wit, that once admitted, immigrants will face a level playing field in which they have a fair chance to succeed by working hard and playing by the rules. The bargain does not promise any special advantages. For instance, the foreign born should have no claim on access to government programs such as affirmative action. The other side of the coin is that they should not be disqualified from the social programs that go along with full societal membership, and to which they must turn because of events that are beyond their control, such as sickness, disability, or loss of a job. This is a fundamental equity principle.

4. Finally, reform requires a surgeon's scalpel, not a butcher's cleaver. In the hyperbole that has engulfed most discussions about immigration, it has become increasingly difficult to stay focused on *what needs fixing*. Blurring the lines between illegal and legal immigration further complicates the reform effort by making it more difficult to focus narrowly on curing defects, rather than on going after the system itself.

THE GATE-KEEPING FUNCTION

Discussions about reform of legal immigration typically focus on the following issues: (a) numbers; (b) admission policies (such as selection formulas, qualifications of those seeking admission, and procedures for evaluating them); and (c) post-admission policies (such as the economic, social, and political responsibilities and rights of newcomers, as well as issues of equity between natives and immigrants in a number of social domains). Two additional issues are beginning to come to the fore: (d) the allocation of resources and responsibility among various political and governmental jurisdictions; and (e) the integration of immigrants—an issue that we as a nation have been avoiding assiduously, even though we are intuitively aware we can do so only at our own peril.[10]

We recognize that these issues cut across numerous political and philosophical domains, which makes them difficult to resolve quickly or definitively. Nevertheless, we believe they can be resolved. Our proposals are intended as first steps in this direction. They focus on the narrower issue of reforming only the system for admitting economic-stream immigrants, who make up the second-largest group of newcomers but are arguably the most controversial.

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[10] The integration process is the "ground zero" of all immigration policy and the ultimate test of success or failure in any immigration system. No immigration regime can be successful in the long run unless it solves the puzzles of integrating newcomers, of building

One way of visualizing what the United States needs to accomplish through immigration reform is to think of immigration policy as "gate-keeping." The system needs to establish checkpoints at every point of entry and to evaluate everyone seeking passage according to clearly understood guidelines that are readable from both sides of the gate—by established Americans, newcomers, and prospective immigrants alike. The gate-keeping analogy also implies that we should take down the old welcome sign, decide which of the old precepts are outdated, misguided, or simply wrong, and replace them with new principles that more accurately reflect what the United States seeks to gain from the continued admission of immigrants. The analogy allows us to make clear that entry *through* the gate is the only acceptable way in. Hence, the government's responsibility reaches beyond simply administering the entry criteria; it must also be effective in denying access to its territory to those attempting to go *around* the gate, and it must establish tougher sanctions for those who violate the rules.

OBSTACLES TO COMPREHENSIVE REFORM

It is easy to underestimate the difficulties associated with accomplishing comprehensive immigration reform. In addition to the issue's breadth and complexity, which make putting one's conceptual arms around it very difficult, comprehensive reform must also contend with at least seven other serious obstacles:

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community out of diversity, and of creating a legal/institutional and sociopolitical environment in which the second generation can achieve success. However, this problem cannot be solved in the absence of inter-group harmony in general and inter-*minority* harmony in particular. The broader challenge for the United States is clear: Unless we can succeed in combating apathy, despair, and inter-group antagonism in our inner cities, we cannot be a successful society in the next century. And we will not succeed in that quest if we continue to disinvest in the social infrastructure of our cities (particularly in the education and training areas), to devalue the efforts of the working poor (while simultaneously withdrawing the social safety net even further), to incite taxpayers to revolt, and then to use the resulting anger as an excuse for cutting programs.

- Jurisdictional issues in Congress and within the administration, which divide control over the issue among many different committees and executive agencies with different priorities and agendas.
- The economics and politics of budgetary reform, which are likely to impoverish many immigrants (as they will many Americans) and give lower priority to reforms in areas other than control and enforcement.
- The intense and difficult politics surrounding the issue—including constituency politics that can hold politicians hostage.
- The emergence of intense partisanship that inhibits the inter-party cooperation on which successful immigration legislation has traditionally relied.[11]
- A limited political attention span, particularly in light of the approaching 1996 elections,[12] which is likely to push legislation through the Congress before its effects on other policy domains can be fully considered.
- The lack of adequate data, which inhibits the making of informed policy choices, often forces policy prescriptions to rely on anecdotal or plainly false "evidence," and enables those interested in making political arguments based on dubious facts to do so with relative impunity. (As in many other policy domains, our gross under-investment in knowledge ill-serves the country.)
- The INS's institutional culture, which has traditionally prized and rewarded enforcement almost to the exclusion of good management and effective services, and which has developed an unenviable record for arbitrariness, intrusiveness, and resistance to change.

Notwithstanding these obstacles—most of which are fully relevant for the narrower scope of reform that is the focus of this study—we believe that the case for reform is compelling and that *any* such effort must include substantial changes in the economic immigration stream in order to help the U.S. economy remain competitive in the twenty-first century.

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[11] On some aspects of the issue, such as employment-authorizing identification matters, even intra-party cooperation is uncertain.

[12] Although the upcoming election may in fact enhance the chances for passing some legislation, it is likely to diminish the probability of *thoughtful* reform.

HOW THE U.S. ECONOMY AND OUR IMMIGRATION NEEDS HAVE CHANGED

In order to understand the kinds of reforms that are needed in economic-stream immigration, we must first understand the radical changes that have taken place in the international economic order over the past two decades and the extremely dynamic global marketplace of today. The effects of these changes on the domestic economies of most international actors, including the United States, have been immense. Specifically, we must understand: (a) the global economy and its requirements, particularly what it values most as it moves into a state of full interdependence; (b) the structure of the U.S. economy, including its strengths and weaknesses; (c) how U.S. firms and their employees fit into the international marketplace; and (d) the worker characteristics that will be most useful to U.S. firms (and, by extension, the U.S. economy) in retaining and enhancing their position in that marketplace.

Although immigration policy can be only one part of a broader U.S. strategy for economic success in the world economy, such an understanding will help us to empower leading U.S. firms to make choices regarding key personnel on the basis of the broadest possible assessment of their needs in the context of international competition.

THE U.S. ECONOMY IN THE 1950s AND 1960s[13]

When Congress developed many of today's economic immigration provisions in 1952, most of the nation was successfully completing the conversion to a peacetime economy by redirecting manufacturing industries toward the production of consumer goods and employing large numbers of discharged military personnel in its factories. Accordingly, manufacturing and agriculture dominated a domestically focused economy. As tensions between East and West intensified, a growing military-industrial complex created hundreds of thousands of additional jobs. Finally, the country was also beginning to invest large amounts of public capital in physical infrastructure, supplying still more employment and the means to move the goods that U.S. workers were producing.[14]

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[13] The discussion in this section is indebted to numerous standard works in the "management" literature, as well as to the many government and private-sector studies of the U.S. economy of the past fifteen years. Among them are works by Robert Frank and Philip Cook, Reynolds Farley, Stephen Herzenberg, John Alic and Howard Wial, Ray Marshall, Barry Minkin, Lawrence Mishel and Jared Bernstein, Rosabeth Moss Kanter, James Brian Quinn, Robert Reich, the Hudson Institute, various public and private sector commissions, and the biennial analyses and projections of the U.S. Bureau of Labor Statistics (as they have appeared in the *Monthly Labor Review*, especially since 1987). Many of the latter set of works, and their relevance for immigration policy, have been discussed elsewhere (see Papademetriou 1994; and Papademetriou and Lowell 1991). All of these works appear in this study's bibliography. Specific authors are identified in the text only when an idea is unique to that author.

At about the same time, international markets began to become more important for U.S. industry. An influx of U.S. capital into the war-torn economies in Europe and elsewhere, which were still unable to produce enough goods for their expanding populations, created opportunities for U.S. firms to build significant product beachheads overseas and broader trade relationships. Combined with startling advances in productivity,[15] these factors resulted in a booming U.S. economy that nearly doubled U.S. per capita income between the end of World War II and the early 1970s.

At the center of this postwar economic explosion, managing its growth and guaranteeing its stability, was the large U.S. corporation, which soon became the core of the nation's economic life.[16] Its role extended far beyond simply organizing capital and labor into the production of goods and services. By tying continued growth to a large and growing internal market, stable jobs and career paths, and stable labor relations, the U.S. corporation became the nucleus in a cycle of production and consumption that transformed both the U.S. economy and its attendant social order.

Corporations could play this central role largely because they were able to craft and maintain a "bargain" between labor and management that guaranteed continued growth by fostering agreement on what Robert Reich has called the "division of the spoils" (see 1991:55, 223). In this bargain, U.S. workers essentially "relinquished" the option of seeking to exert influence over broad institutional policy issues[17] in exchange for job security (virtually *de facto* lifetime employment), seniority-based advancement, adequate compensation to support a family, and access to generous benefits—i.e., the key ingredients for a middle-class existence. In return, the corporation expected[18] production workers and middle managers to learn how to work within large and vertically integrated bureaucratic organizations, be reliable, work hard, and follow orders—and rarely sought their input on product development or process innovation.

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[14] Manufacturing and agriculture received most of the attention and produced the overwhelming majority of the measurable gross domestic product (GDP). In terms of *total employment*, however, the goods-producing sector (manufacturing, farming, mining, and construction) has been employing fewer than half of all U.S. workers since 1940.

[15] Two key reasons for such productivity gains were continuous developments in scientific management and the technology of high volume mass production—both pioneered by U.S. industry (see Herzenberg *et al.* 1996).

[16] The discussion about the role of the corporation and the bargain between management and labor is primarily of heuristic value. It abstracts and generalizes from a set of relationships that apply primarily to that period's large oligopolies and regulated monopolies, such as utilities. The reality was much more complex than this model suggests. For instance, this discussion ignores the role of women workers. Moreover, most smaller and less stable companies (where most women worked) did not offer the opportunities this model suggests.

All of the corporation's constituent elements—stockholders, executives, middle managers, and production workers—shared in the growing profits generated by this system. They in turn spent their rising income on goods made by other U.S. corporations with similar structures, thus further supporting the lifestyles of their neighbors and creating more jobs for their children. They also saved enough of their income to fund investments in technological innovations that boosted productivity and further enhanced broader economic growth (Herzenberg *et al.* 1996).[19]

New technologies and products—the key to an industry's success—were developed over long periods of time almost exclusively by research and development shops within the corporation itself or with allies in academia, not by eliciting worker input. To be sure, technological progress required workers to learn new skills all the time. However, many of these skills could be learned on the job or in short periods of employer-sponsored training, and they were generally adequate for workers to share in the gains of the country's growth without expensive investments in their own continuing education or training. In fact, even the most advanced industrial equipment in the 1950s and 1960s was operable by someone with a twelfth-grade reading level and a modest amount of on-the-job training.

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[17] It is worth noting that this path differs sharply from the one followed by worker organizations in most European countries, some of whom chose to emphasize a policy of "co-determination" on institutional policy issues while others opted for a policy of confrontation. In neither instance did European workers surrender any of the "benefits" that this bargain bestowed on American workers.

[18] The reification is typical of writings about the period, with "the corporation" often assuming certain concrete, even anthropomorphic, characteristics. Some authors have in fact gone so far as to reduce the life of the nation to that of the corporation. Reich (1991:43), for instance, writes that: "[b]y the 1950s, the well-being of individual citizens, the prosperity of the nation and the success of the nation's corporations seemed inextricably connected."

[19] In most instances, the advance of technology itself was adequate to raise productivity enough to further drive the engine of growth.

Clearly an abundance of capital and natural resources, and the economies of scale associated with mass production, were the most crucial elements of U.S. economic success. But there was still another factor: a supportive public sector (and, more broadly, public institutions). The public sector's role was essential in several respects: (a) in supporting and reinforcing the labor/management bargain (primarily through such New Deal–enshrined worker gains as the right to organize and the Fair Labor Standards Act); (b) in making the results of defense-related research and development available to U.S. firms, thus expanding the knowledge-intensity of their products; and (c) in maintaining a system of public education that taught good work habits, the importance of following rules, and the basic reasoning skills (reading, writing, and arithmetic) necessary for modern factory jobs. It also promoted the selection of the nation's brightest youth for post-secondary education, and made public funds available not only to universities but also to students, especially returning veterans, thus ensuring a steady supply of researchers, managers, and technicians.

Immigration played a relatively modest but nonetheless significant role in the spectacular postwar rise of the United States. Although a significant proportion of that immigration took place outside the parameters of the Immigration and Nationality Act of 1952 (INA),[20] the overall framework created by the 1952 Act was generally consistent with the broader thrust of most government action during the 1950s and 1960s: enhancing economic growth while preserving (or at least not undermining) the bargain between labor and management on which postwar prosperity—and social stability—rested.

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[20] For instance, most refugee flows in the 1950s were accommodated outside the INA, and even some of the regular immigration flows were possible only by "mortgaging" certain countries' future visas.

As a result, the admission of economic-stream immigrants was pegged primarily to filling jobs for which no U.S. workers were available, while U.S. workers were presumed to be "protected" from declines in their wages and working conditions through the wage provisions of labor certification (see Chapter 2). The INA thus formalized the notion that immigration should essentially respond to surges in the demand for labor and its inevitable supply shortfalls.

The 1965 amendments to the INA reinforced that notion. With the emerging appreciation that technological advancement would assume a more important role in maintaining the rate of economic growth, the 1965 amendments sought to facilitate the admission of skilled and educated foreigners by acknowledging the emergence of a global economy.

THE U.S. ECONOMY SINCE THE EARLY 1970s

Soon after the passage of the 1965 amendments to the Immigration and Nationality Act, the edifice of the postwar economic order—and the U.S. economy's dominant place in it—began to crumble. There were many reasons for this breakdown, most of them due to U.S. actions.

Although the lack of serious international competition noted earlier contributed to U.S. economic success, this very advantage gradually turned into a disadvantage. Lack of significant competition lulled U.S. industry into focusing primarily, if not exclusively, on domestic production and made it inattentive to the importance of guarding its market share abroad, looking for an extra edge, or, most consequentially, investing systematically in new technologies or in the skills and cognitive capacities of its workforce.

Many U.S. firms and entire industries failed to adapt their organizational culture quickly or fully enough to shorter product development cycles, more efficient and quality-conscious manufacturing, and more targeted and aggressive marketing. They also failed to emphasize and reward flexibility, process innovation, ideas, skills, and knowledge to the degree they should have.

Another set of reasons was external. It included the revival of other postwar economies, the superior quality and price competitiveness of many foreign products (often aided quite openly by government subsidies and protectionist policies), and the increasing marketing aggressiveness of many foreign firms. Systematically falling trade barriers, most of them coming down as a result of U.S. initiatives,[21] accelerated many of these processes. The combination of such acts of omission and commission—and, in no small part, the earlier policy inattentiveness and miscalculations by the U.S. public sector—made unfettered competition a defining characteristic of the new world economy.

Globalization and the reality of full economic interdependence are, of course, inescapable facts. The figures are nothing less than astounding. During the period under discussion, U.S. exports grew from about $20 billion in 1959 (and just $27.5 billion in 1965) to more than $700 billion in 1994.[22] Imports during the same period registered similar growth—from about $22 billion to more than $800 billion (Council of Economic Advisors 1995:274-75). The total value of international economic transactions (imports plus exports) grew from a little more than 8 percent of the GDP to more than 22 percent of GDP. By 1991, total international sales by U.S. multinationals (from exports, direct investments, or joint ventures) generated an estimated $1.2 trillion—accounting for nearly 30 percent of corporate revenue (*Business Week* 1994:62-63).

Even more telling, U.S.–owned firms are now competing with foreign-owned firms *not only abroad but also in the United States.* It has thus become as difficult—and in many respects much less useful—to distinguish "American" from "foreign" firms as it is to separate "domestic" from "foreign" markets for one's products.

This "de-nationalization" of economic activity has effected significant changes in U.S. economic institutions and the social organization that undergirds them. The bargain between labor and management has collapsed, as access to cheaper labor overseas has eroded the bargaining power of U.S. workers and their organizations.[23] The "American corporation" has become less and less "American" as companies move operations overseas and foreign capital pours into the United States.[24] Relentless foreign competition forces U.S. corporations to be more cost-conscious than ever while intensifying the race for product and process innovation, increasing the speed of technological progress, and intensifying interest in flexible staffing.

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[21] It is not always fully appreciated that one reason for the single-mindedness with which successive U.S. governments have pursued trade liberalization is the need to regain through "hard-nosed" negotiations ground lost in earlier days, when the United States granted access to its market without securing fully reciprocal access for U.S. companies and products.

[22] Between 1986, when the trade deficit peaked, and 1991, overseas trade accounted for about 30 percent of *real* economic growth (*Business Week* 1992:31). Gains in manufacturing exports during the same period were also dramatic. They more than doubled, from $150.7 billion to $349.7 billion, increasing the U.S. worldwide share of such trade from 16.7 percent to 17.4 percent (U.S. Bureau of the Census 1994:764).

More important for this study, globalization has placed a premium on a better educated and trained workforce. A firm's productivity and competitiveness depend increasingly on its products' *knowledge content* (as distinct from its content of capital and other physical resources), on the innovativeness of its processes, on "first-to-market" corporate strategies, and on the ability to develop and exploit global connections by what Moss Kanter (1995b:153) calls "managing the intersections" at the "crossroads of cultures." The constantly shifting need for specific (rather than generic) expertise means that firms can obtain the needed talent more easily, if not more cheaply, from outside—in effect adopting a "just-in-time" approach to the composition of the workforce. Flexible staffing, as this is called, has lessened interest in investing in the training of one's workers.

The resulting policy dilemma has been extraordinary and is aggravated further by radical changes in the capacity of public institutions to safeguard some level of social coherence while promoting broader economic growth. Government now realizes that its role as legitimizer and overseer of the labor/management bargain has lost much of its relevance—primarily because neither of the parties to the bargain exist any longer in their previous form, while its own role in many other policy domains has been systematically downsized and eroded.

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[23] The effect of trade accords on U.S. workers is extremely complicated and controversial. On the one hand, trade accords force open foreign markets for U.S. firms and separate acceptable from unacceptable behavior in international economic conduct. A panoply of rules regulates such conduct, while regimes of often severe sanctions are intended to deter unfair trading practices. In this form, trade accords clearly benefit U.S. workers. On the other hand, by providing more open access to the U.S. market, trade accords put extreme pressure on marginal or otherwise non-competitive U.S. industries that employ substantial numbers of U.S. workers. While good for U.S. consumers (who benefit from the ensuing competition), such situations point up the trade-offs between competitiveness and efficiency, on the one side, and the social implications of lower wages, higher inequality, and unemployment, on the other. (The precise relationship between trade and inequality is ambiguous at best. Clearly, trade liberalization does contribute to inequality by placing a higher value on products and services that have higher, rather than lower, knowledge content. Hence higher-skilled workers benefit while lower-skilled ones lose.) It is in this latter form that trade accords contribute to job dislocation (but not to net job losses in the aggregate) and may adversely affect social coherence—at least in the short to medium term.

[24] Between 1980 and 1992, U.S. overseas investments more than doubled, from $215 billion to $487 billion. At the same time, however, foreign investment in the United States more than quintupled, from $83 billion to $420 billion (see U.S. Bureau of the Census 1994:808, 811).

A failure to fully comprehend how radically the nation's basic economic and related social and labor market institutions have changed in the past two decades may well be at the heart of our failure to diagnose and treat the implications of the broader economic changes. After all, in the past ten years, the U.S. economy has generally met most of the standards for macroeconomic success. It has experienced relatively low rates of unemployment and inflation, declining and largely stable interest rates, still-significant productivity advances,[25] and gradual but steady growth. Nevertheless, the changes must be confronted. They are irreversible.[26]

In an attempt to get a conceptual handle on this situation, some analysts—and many politicians—have made *economic uncertainty* the definitive diagnosis of what ails the United States at century's end. This may have some sociological validity, particularly as it pertains to managers and other white collar workers,[27] who until recently have been much less accustomed to job instability and to uncertain economic prospects than production workers. In many respects, however, the very imprecision of the term "uncertainty" masks the "truth" the concept has tried to capture. By continuing to look at the same few indicators (e.g., unemployment or industrial orders and output) as a measure of the nation's economic performance, one may miss a crucial insight: In this age of economic interdependence, *what* an economy produces, or even *how* it produces what it does, in technical terms, is less important than the structure of and interrelationships among the *institutions* that organize people toward a common economic purpose. Thus, we must shift our attention to how the organization of production in a knowledge-intensive economy melds human resources and production processes into production "systems" that stress high-performance, high-quality, and high-productivity outcomes. Such outcomes thrive in large part on decision structures that are participatory and that reward continuing education and training. These attributes are increasingly the backbone of competitiveness. They are also at the heart of good jobs at good wages and, by extension, successful economies and societies (Marshall 1995).

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[25] In the 1960s, productivity growth stood at about 2.8 percent, while in the 1970s it dropped to about 1.7 percent (see Herzenberg et al. 1996). Productivity gains for manufacturing in the past 15 years have fallen to one percent and lower than that in the service sector, which now accounts for two-thirds of the national output and employs three out of four U.S. workers. Lagging productivity is in large part responsible for the stagnation in the wages of some groups of workers, particularly those in the service sector. Overall productivity, however, remains comfortably higher than in virtually all other industrial countries.

[26] International *political* events have intensified this transformation further. For instance, as the need for a large defense presence here and abroad gradually diminishes, we can expect the release of many more highly trained men and women into the civilian workforce and significantly reduced competition between the public and private sectors for the services of entry-level youth, who are selected because they have many of the basic educational foundations our economy needs—a prospect that in the more optimistic times of a few years ago was called the "peace dividend." An additional, and perhaps even more important, component of this "peace dividend" may be the long-term redirection of the talents and aspirations of many of our most highly trained scientists and engineers toward careers in the civilian economy.

[27] Unpublished data on *displaced workers* from the DOL's Bureau of Labor Statistics (BLS) show that executive, administrative, and managerial occupations, as well as adminis

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trative support and clerical occupations, have experienced the greatest growth in displaced workers in the past fifteen years (increasing from 7.8 to 13.7 percent and from 11.1 to 15.7 percent of all displaced workers, respectively). Tellingly, significant levels of job instability have also been encountered by professionals (growing from 5.4 to 8.2 percent of all displaced workers) and service workers (increasing from 6.8 to 9.8 percent). Not surprisingly given the increasing representation of workers from these occupations among displaced workers, the share of operators, fabricators, and laborers, as well as of precision production, craft, and repair workers among displaced workers has decreased, respectively, from 36.4 to 21.2 percent of the total and from 20 to 16.2 percent of the total (see Herzenberg et al 1996). A different set of measures tells a somewhat similar—if more refined—story. Howell and Mueller (1996) focus on shifts in the skill mix of U.S. jobs and find the following: what they call "subordinate primary sector jobs" (e.g., routine white collar jobs that require moderate cognitive skills [such as administrative and clerical workers] and high wage blue collar jobs that tend to be unionized and command high wages and benefits) have taken most of the "restructuring" hit—with a 4 percent decline in employment between 1979 and 1990. "Independent primary sector jobs" in both public and private sectors have grown most rapidly since 1973, increasing from 25 to 32 percent of the workforce. Most of that growth has been in the private sector. Finally, "secondary sector jobs," in both their low-wage blue collar job and low-wage service job configurations, have basically held their share of total employment. The most recent projections of the U.S. employment picture by the BLS to the year 2005 (see Kutscher 1995) suggest that these trends will continue. For instance, the BLS projects that most of Howell and Mueller's "independent primary sector jobs"—roughly professional specialty, services, technician, and marketing occupations, in that order—will experience the largest job growth. Executive, administrative, and managerial occupations, however, are projected to experience much slower growth in the next ten years than they have in the past fifteen years.

1-3. GLOBALIZATION AND HUMAN INSTITUTIONS

It is human institutions—worker organizations, professional and business associations, citizen groups, government at all levels, but *also* the corporation—that have always curbed the worst excesses of capitalism and promoted broader social goals. Many of these institutions have seen their power erode precisely when the need for their moderating influence appears to have intensified. Thus, many of the mechanisms devised over the course of decades of social democracy for "leveling" the worst types of inequality—from progressive taxation and government regulation to the labor/management bargain discussed earlier in the text—have been giving way to "efficiency"-motivated "reforms" and "winner-take-all" outcomes (see Frank and Cook 1995). Within the corporation, "inefficiencies"—whether in production methods or employment and wage policies—are identified and systematically stamped out. The combined dictates of the global economy (which offers high rewards for U.S. products and services with higher skill content), the continuing shift to the service economy (with its relatively fewer "good jobs"), technological change (which requires radical reforms in areas as diverse as production techniques and organizational management and threatens to make vast numbers of jobs at all edu-

THE WORKERS THE U.S. ECONOMY NEEDS NOW AND MUST HAVE IN THE NEXT CENTURY

Because globalization makes some of its most difficult demands on human institutions (see box **1-3**), its effects have been felt most acutely in the labor force. The twin realities of intense international competition and the lure of well-prepared and disciplined, yet inexpensive, labor overseas—when taken together with such factors as the attraction of becoming established in emerging markets *early* (as Japan has sought to do throughout East and Southeast Asia), the increasing political stability in most developing countries, and the reductions in transportation costs—have removed much of

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cational and responsibility levels redundant) both compel and pace such changes and reinforce their employment effects. This poses a challenge of immense proportions which neither analysts nor policy-makers yet understand well enough to respond to it in a comprehensive manner.

As John Gibbons, then Director of the Office of Technology Assessment (OTA), put it in a noteworthy 1992 study, *U.S.-Mexico Trade: Pulling Together or Pulling Apart*:

> "[T]he key to success in managing the social and economic transformations of the coming decades lies with the institutions that frame public and private choices—decisions made by employers, by workers, by government officials. . . . [R]ecently, Washington has been backing away from . . . [the] responsibilities . . . for managing the macroeconomy and providing a safety net for laid off workers and their families, without replacing them with new institutions and new policies . . . . The NAFTA debate provides an occasion to reconsider U.S. institutions . . . . [L]abor, management, and society at large must pull together . . . or the social strains created by 'globalization' could pull the Nation apart" (OTA 1992:iii).

the remaining incentive for management to remain committed to the labor-management bargain, with devastating consequences (particularly, though not exclusively) for low-skilled U.S. workers.[28]

This realization has led to increasingly earnest discussions about improving economic opportunities for workers by improv-

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[28] Wage earnings differentials between college and high school graduates increased from about 33 percent to nearly 56 percent between 1979 and 1989 (see Mishel and Bernstein 1993). Instructively, both groups have experienced losses in *real wages* since 1979: young male high school graduates by 30 percent, college graduates by 8 percent (Marshall 1995:50).

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ing their levels of education and vocational skills.[29] Filling good jobs and enticing businesses to invest in the creation of more good jobs requires an adequately prepared workforce or a nation's economic and social progress will be undermined. In fact, the more other things become equal,[30] the greater the weight of such intangibles as a business-friendly environment and, more appropriately for our discussion, a "world-class" workforce becomes.

Rosabeth Moss Kanter (1995a, b) provides a much fuller picture along these lines in her discussion of the criteria for success in the global economy (see box **1-4**, p. 27). She focuses on the intangible assets that successful firms look for in making their locational decisions: access to "concepts," "competence," and "connections." Three types of workers correspond to these assets. "*Thinkers*" specialize in concepts, the "leading-edge ideas, designs, or formulations for products or services that create value for customers;" through their technological creativity, they are the key to successful knowledge-based industries and products.[31] The strength of "*makers*," Moss Kanter's second classification of workers, is competence and the ability to "translate ideas into applications" for customers and execute them to the "highest standards." (A local economy that excels in "*makers*" meets an indispensable criterion for world-class production; when matched with an appropriate infrastructure and a business-friendly environment, it can become extremely attractive for the location of competitive firms.) Moss Kanter's final criterion for success is a class of "*traders*." They "sit at the crossroads of cultures, managing the intersections," mak-

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[29] In a nation that has steered clear of too much government involvement in market decisions, focusing the discussion on the workforce has been ideologically safe. Thus, it is not surprising that both the Bush and Clinton Administrations made such discussions hallmarks of their tenure in office.

[30] Increasingly, tangible things such as advanced physical infrastructure (including the availability and cost of capital), relative social and political stability, a growing class of consumers, and a basically sound macroeconomic foundation, are becoming "more equal" across most advanced industrial and many industrializing countries. These are the attributes that capital (and footloose companies) value most as they seek the most advantageous returns on investment.

[31] "Thinkers" are not unlike the "symbolic analysts" who are Robert Reich's candidates for continued economic success. Such analysts "solve, identify, and broker problems by manipulating symbols. They simplify reality into abstract images that can be rearranged, juggled, experimented with, communicated to other specialists, and then, eventually, transformed back into reality" (Reich 1991:178). For Reich, with his strikingly binary view of the world, "symbolic analysts" will also be the crucial source of wealth in the only truly "American economy" left: *the sum total of the capacities of Americans to contribute value to the world economy* (1991:219-224).

1-4. THRIVING LOCALLY IN THE GLOBAL ECONOMY*

A series of case studies by Moss Kanter (1995a) serves to demonstrate how important such policy synergy is if local economies are to thrive in the global economy. In one of the case studies (Greenville and Spartanburg, South Carolina), Moss Kanter details how a well-organized state and local community effort focusing on education and training addressed the frequently conflicting priorities between social and community interests and the needs of globally competitive enterprises through the promotion of a "civic culture." This culture attracts and retains robust firms by providing a competitively skilled work force and a broader environment—including physical infrastructure and a set of incentives—that emphasizes cooperative relations between public and private sectors. Two key lessons one draws from Moss Kanter's work are relevant to this aspect of our analysis: (a) an excellent workforce helps keep both people and companies in place; and (b) good jobs at competitive firms can raise wages for workers in other firms because they all compete for workers from the same labor pool. A good workforce and a collaborative spirit toward solving problems and "creating the future" thus become both "magnets" for world-class businesses and the "social glue" that keeps communities thriving.

* This title is borrowed from Rosabeth Moss Kanter's recent work of the same title and cited in this study.

ing deals and leveraging "core capabilities," creating more value for customers, or opening doors, widening horizons, and moving goods and services across borders (1995b:152-54).

In addition to its value as an insight into the types of talents that competitive firms value *and that societies must produce in large numbers if they are to be successful in the long run,* the preceding discussion makes clear that, increasingly, no *single* mea-

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sure of skill or education level can accurately predict one's ability to climb into *and remain* in the class of workers who will experience sustained success. The bundle of skills that the next century's most successful workers will need goes far beyond reading ability, arithmetic skills, and most of the other skills taught in America's high schools, and even the technological adeptness that can be learned on the job or in training programs. Successful workers will need to be adept in communication *per se*—effectively developing, analyzing, and transmitting *concepts and ideas* and translating them into high-quality products and sales in the world economy.

If this analysis is even partially sound, one of the most important "qualities" a worker can have is *adaptability*. In an era and an economic system where firms—even industries—are born, move, or die at an unprecedented pace and technologies always change, successful workers ("thinkers," "traders," but also "makers") must be ready at all times to "pack up their skills" and move to new pursuits. Upward occupational mobility may now be attainable more easily *across* rather than *within* firms (see Marcotte 1994). *The most successful workers will thus be those constantly on the lookout for a more productive use of the unique bundle of skills and talents they possess.* Hence the need for educational reforms that impact not only the "basics" of building analytical skills and encouraging original, creative thinking, but also the skills for effective transitions from school to work and from one job or industry to another. Only by giving workers the tools and the opportunity to extract real value from applying what they have learned in the education system will we as a society be able to maximize our returns on our educational investments.

FASHIONING AN ECONOMIC-STREAM IMMIGRATION POLICY FOR TODAY'S COMPLEX NEEDS

The Immigration Act of 1990 in effect acknowledged the existence of a class of "global citizens" who can operate effectively in the changed world of today. It more than doubled the number of economic-stream immigrants, encouraged and simplified the immigration of exceptionally qualified people, and responded to the requirements of the global economy through extensive changes to the U.S. non-immigrant system (see Yale-Loehr 1991 and Papademetriou 1994). However, it passed without a focused discussion of the characteristics that will be needed from the workers of the future. As a result, the 1990 Act did not specify the "outstanding" and "extraordinary" characteristics, "exceptional" abilities, and "skills" the country should require of its economic-stream immigrants.[12] More important, the 1990 Act was not a true affirmation of the *principles* of economic-stream immigration, although it effected a significant reordering of immigration priorities. In other words, while it made a major policy statement that placed greater emphasis on economic-stream immigration, it largely continued to enshrine the INA's basic underpinnings for such immigration and used them to justify the (albeit larger) flow of economic-stream immigrants that it sanctioned.

Before any reordering of the present system for admitting economic-stream immigrants into the United States, we must ask tough questions regarding their most appropriate role as our country approaches the third millennium. In particular, we need to think through once more the foundations on which the economic immigration stream rests—in both the permanent and temporary admissions systems—but to do so in the context of the preceding discussion on global economic changes and their implications for U.S. firms *and* U.S. workers. The essential question is how to promote U.S. competitive interests by facilitating access to key foreign-born personnel without unnecessary procedures, while simultaneously not undermining the broader social policy goals that advance the interests of U.S. workers overall.

The task is daunting. At its most general level, it requires that we anchor immigration policy on a rational foundation that partially redefines the interests of U.S. workers and then takes their interests more explicitly into account than has been the case to date. In turn, this requires that we tackle head-on the practical issues of which, how, and when (i.e., under what conditions) foreign workers should gain access to the U.S. labor market.

We believe that such decisions should proceed from the general proposition that the needs of the economy and the labor market, in that order, should have the leading roles in this determination. Consider the example of computer programmers. There are many "types" of such programmers, each with a bundle of specialized skills and experience that makes him or her

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[12] The words in quotation marks reflect the three broad classes of employment-based immigrants that may gain admission under the 1990 Act.

"unique." An employer certainly has the option of hiring a solidly trained programmer and investing in his or her training to get the specific skills the employer needs. In our dynamic and volatile labor market, however, employers increasingly prefer to get the needed skills from outside the firm, even if they must pay a premium. This avenue guarantees them the "instant gratification" of getting the "right person" for the job who can "hit the ground running."

Other than in the most "generic" job-matching sense, the government must resist the temptation to become more involved in decisions about occupational and related needs in this and other areas.[13] These are decisions that the market can make much more quickly, accurately, and efficiently. At the same time, we should not expect to make up instantaneously through immigration for competitive ground lost over the long series of business and government errors discussed earlier in this chapter. Attracting immigrants with the higher-level skills that our economy needs now and from which it can benefit well into the future is an option that should be pursued *as just one part of a broad strategic assault on our competitive woes.* Failure to pursue diligently the other elements in such a strategic plan of action (particularly in education, training, and broader social policy areas) or relying on immigration in a way that acts as a disincentive for the market to make the adjustments it would otherwise make[14] in response to tighter supplies of highly qualified workers, might make our broader national priorities less likely to be achieved.

Globalization also prods us as a nation to make a national commitment to lifetime education and training. A thoughtful and well-managed immigration policy will neither be in conflict with nor passively undermine that effort. Rather, it offers an opportunity for engaging American business in a dialogue about investing—and offering incentives to invest—more intelligently and comprehensively in the preparation of U.S. workers. Such a policy will place immigration within the larger framework of a national competitiveness strategy that chooses and facilitates the admission of the best qualified immigrants while investing systematically in increasing labor market self-reliance (see box **1-5**).

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[13] Janet Norwood, the widely respected former Commissioner of the Bureau of Labor Statistics (BLS) addressed the methodological issues of making such judgments in her testimony before the House Immigration Subcommittee on March 1, 1990. There, she cautioned that "[e]ven if we [BLS] were able to find that some of the required variables [i.e., those necessary for establishing the nature and duration of occupational shortages] could be measured with acceptable reliability, meeting the needs of those who implement immigration policy would still require the making of judgments that fall outside the expertise of a statistical agency" (U.S. House of Representatives 1990a:74).

[14] These might include offering higher wages in a manner consistent with gains in productivity, improving working conditions, and additional investments in technology, organizational innovation, and *worker training and retraining.* Such initiatives enhance worker productivity and pay handsome long-term dividends in terms of both U.S. social development and global competitiveness.

Despite recognition of the importance of such a strategy, we are still struggling with a fundamental failure of imagination in this regard. By most measures, neither business nor government has been doing an adequate job in retraining the U.S. workforce, while efforts to create a synergy that would at least help young people make more effective transitions from school to work have yet to bear fruit. Even if some of these efforts gradually begin to pay off, the relatively few workers who will receive generic training under such programs will not meet the specialized needs of firms that now hire foreign professionals. It is in this context that immigration has and must continue to be relied upon to provide small increments of the skilled and educated workers our economy needs.

In such a framework, the best course for an economic-stream immigration policy is to set up certain goals and a robust mechanism by which we expect our corporate citizens to make decisions about who they propose be admitted, through what process, and whether permanently or temporarily—the former typically in response to longer-term and perhaps structural needs, the latter typically in response to shorter-term needs in areas of ongoing adjustment.[15] If the principles and the accompanying mechanism are well thought out, they will have self-regulating parameters that will reduce access to immigrants in times of low demand for labor while expanding access in times of high demand.

Without a flexible and well-managed economic immigration selection mechanism, many of our most competitive firms with

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[15] There are good reasons for not making decisions about immigration exclusively on the basis of conditions of the moment. Employers making investment or product development decisions on such narrow grounds would certainly not prosper in the long term. Employers must be encouraged to make decisions about hiring foreign workers by employing the same types of strategic analysis as they do in making other important decisions.

1-5. TRAINING AND IMMIGRATION

The training issue is one of the toughest policy enigmas our nation confronts. Despite enormous public expenditure—the Department of Labor has spent nearly $75 billion on direct training programs just since 1978—attempts to have the government do what the private sector can do, and should be doing better and more systematically, have had a record of failure. The results of more recent efforts to create public/private training partnerships, to "privatize" training, or to copy other countries' apprenticeship and vocational training programs also have been disappointing. (Germany's system seems to hold particular attraction for some policy-makers. However, its advocates overlook that system's inflexibility, its unattractiveness among German youth—and the resulting under-subscription—and its entirely different social, political, and institutional context.)

Training's assumed connection to immigration policy compounds the issue's complexity. At some level, a better organized training system would reduce some of the demand for certain semi-skilled and even some skilled immigrants. This would be even truer in a philosophical (and political) framework that attempted to micromanage the most minute hiring and personnel decisions of firms in ways in which some advanced industrial countries are prone to do (see the discussion about Europe in Chapter 3). In rejecting such policies, we are left with two realistic options: (a) to allow the immigration of semi-skilled and skilled workers following certain largely *pro forma* labor market searches that almost invariably result in the government ratifying the employer's choice (as per the current system; see Chapters 2 and 3); or (b) to ratchet up the process' qualification criteria so that employers would be unable to successfully petition for semi-skilled workers in all but the most unusual circumstances and would be able to import certain skilled workers only when they fall into what we call the "master-craftsman" or "trainer-of-trainers" category (see Chapter 4). (A third option, the reform of the current system so a "real" labor market test might identify U.S. workers with the relevant skills, is downplayed here since it is the subject of the study itself.)

To anticipate the conclusions of this study, we opt emphatically for the second course on both economic and social policy grounds. From an economic policy perspective, in the absence of easy access to semi-skilled and skilled foreign workers, one of a firm's rational choices will be to re-establish internal training and upward mobility ladders. (Another choice might be to band together with other firms in the same industrial subsector and develop, offer, and partly fund an appropriate and practical training regime.) From a social policy perspective, such training and ladders are essential for upgrading the skills and wages of a cohort of our workforce that has suffered most directly from the labor market transformations of the last two decades.

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It is also important to continue to experiment with more active partnerships between government and the private sector in the realm of technical training, but with each sector playing to its presumed strengths. Thus, the public sector could focus on educating our future workers and preparing them for effective transitions to the world of work, while the private sector invests systematically in training and retraining solidly prepared workers to meet specific needs. Natural alliances between the two sectors in secondary and post-secondary technical education do not violate this principle, and may be among the things that need to be emphasized more consistently.

The picture changes significantly when the focus shifts to professional work, however. Here, for reasons discussed elsewhere in this chapter, the reality is that individuals rather than employers now are responsible for much of their own training. Except for some financial support to educational institutions, the government has never had much place in regulating professional work, and it would require an enormous leap of faith to expect it to perform a professional training function well, particularly in view of its failures in performing similar functions for low-skill occupations. (A highly critical report regarding a job-training program in Puerto Rico by the Department of Labor's Office of the Inspector General makes exactly the same point—only much more sharply. See Myint & Buntua 1996.)

Rather, private business and such groups as employee groups, and professional associations must take the lead in professional training initiatives. Some thoughtful reform-minded analysts are indeed beginning to look at the possibility of engaging professional associations more systematically in providing training and associated job-matching functions as a means of promoting professional development and commitment to quality. Certain associations are already involved in such activities, particularly in the medical professions.

The judicious use of foreign-born professionals offers another way out of the training dilemma. If they are chosen on merit and offer their prospective employers no other advantages (such as a willingness to work for less money or work "scared" because they need their employers to sponsor them as immigrants), foreign-born professionals allow the company that employs them to remain competitive without affecting adversely the interests of their co-workers. This is also perfectly consistent with the system of opportunity-based and human capital investment–rewarding competitive labor markets that have always defined the United States. In such markets, a seller's principal asset is his or her human capital, while a buyer obtains exactly the skills he or she needs "just in time." That system has served our economic interests well. In the absence of a social pact that it should be changed, and until we have a better system ready to take its place, we should not tinker with something that works.

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vast global operations may reconsider their investments in additional capacity. Firms whose products are primarily knowledge-based, such as software developers, can choose to expand wherever the main intangible asset they need—"knowledge workers"—is in ample supply. "Real-time" satellite communications that bridge distances instantly and lower labor costs, together with incentive packages from other countries, make the temptation to locate abroad ever more enticing.

Manufacturers of tangible products are confronted with similar calculations. When Intel recently announced its intent to expand its manufacturing capacity, more than $3 billion of the investment, expected to create about 3,500 jobs, was for places other than the United States.[16] In other words, globalization means that firms must be "convinced" that investing in one place rather than another is in their interest. With knowledge having become so diffuse, and with competition among countries for attracting strong corporations intensifying (Israel committed $608 million in "grants" to attract the $1.6 billion Intel investment), global firms increasingly look for such assets as an excellent workforce, a modern infrastructure, a strong consumer base, and a business-friendly environment. *Immigration policy—no less than policies to improve the quality of our human resources, maintain an excellent infrastructure, and provide a business-friendly regulatory environment—must thus support rather than undermine efforts to convince firms that they can remain and expand their operations in the United States and still be competitive in the global marketplace.*

The chapters that follow take up the following issues. Chapter 2 describes the current U.S. employment-related visa categories for both permanent and temporary immigrants and discusses their shortcomings. Chapter 3 critiques various ways in which the United States, Europe, Canada, and Australia select permanent and non-permanent economic-stream immigrants and concludes that the point systems of Canada and Australia should be adapted to meet U.S. needs. Chapter 4 sets forth a series of guidelines and develops a set of recommendations for fundamental reform of the way the United States selects most economic-stream immigrants, including guidelines for a modified point system. It lays out the design of an immigration system to serve U.S. interests into the twenty-first century.

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[16] These were in addition to expanding Intel's manufacturing operations in the United States. Most of Intel's new foreign investment is slated to go to Israel and Ireland (*International Herald Tribune* 1995:9).

2. CURRENT U.S. EMPLOYMENT-RELATED VISA CATEGORIES

Current U.S. law permits flexible annual targets for admitting refugees,[17] authorizes a combination of numerically limited and unlimited categories in the family reunification stream, and establishes a maximum quota of 140,000 visas for employment-based immigration. In practice, admissions under the first stream are usually below the number authorized; admissions under the second stream always reach the maximum allowed; and, since FY1992, admissions under the economic stream have been far short of their allocated quota.

In the long run, admissions under the economic stream exert a disproportionate influence on U.S. economic, social, and cultural well-being. Economic-stream immigrants bring energy and skills to refresh our stock of human capital. They contribute strongly to the creation of American jobs and wealth and help to facilitate and invigorate international commerce and trade. Although some contend that immigration might reduce job opportunities for some U.S. workers or lower prevailing wage rates—*concerns made increasingly relevant because of failures in the way some rules were conceived and, even more so, in the way they are executed*—on balance, economic-stream immigrants represent a strong net plus to our society.

This chapter discusses the work-related immigrant (i.e., permanent) and non-immigrant (i.e., temporary) visa categories specified in the Immigration and Nationality Act (INA) of 1952, as amended since then. The multitude of such categories illustrates both the complexity of the immigration system and the *ad hoc* and often inconsistent character of many of its categories. Two additional features of the system also become obvious: a certain amount of redundancy in visa categories and an increasing parallelism between the permanent and the temporary work-related visa systems.

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[17] There are no annual numerical targets or limits on asylum seekers.

On one level, these characteristics reflect Congress' attempts to deal with extremely complicated economic and social issues which intersect with each other in both purpose and effect. On a second level, some of the system's features reflect the circumstances and realities of the period in which they were codified. The B-1 and certain provisions of the J visa fit in this category. On yet another level, they reflect the reality that the immigration system is routinely "accessed" by executive agencies and Congressional interests seeking to use it to accomplish aims not directly related to immigration, at the cost of undermining the overall system's internal organization and logic and, in some instances, subverting—even defeating—the purposes of the visa categories themselves.[38] This is most frequently the case with trade and other foreign political and economic policy-related visas, such as the B-1, E, J, L, and Q non-immigrant visas, as well as certain aspects of the H visa category, from which Canada and, in the future, Mexico, are exempt on the basis of their new trade relationship with the United States.

IMMIGRANT VISA CATEGORIES

Federal restrictions on foreign workers coming to the United States to work temporarily began with the Contract Labor Act of 1885. That law made it illegal to prepay the transportation or otherwise help foreigners to come to the United States to perform contract labor. The law was designed to protect U.S. workers from competition by imported foreign workers, but it often failed to meet that goal.

Variations of the contract labor law continued until 1952, when Congress enacted the Immigration and Nationality Act. The INA repealed the contract labor provisions and formally created

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[38] This is not an argument for refusing to use the immigration system to achieve important national priorities. Rather, it suggests that these priorities should be pursued through specially designated visa categories so as not to undermine the internal logic of existing categories. Such a practice would yield important "truth-in-immigration" benefits.

2-1. EXPLANATION OF TERMS

Beneficiary: A foreign national who receives immigration benefits from a petition filed with the U.S. Immigration and Naturalization Service (INS) or a visa issued by the State Department. Beneficiaries generally derive a privilege or status as a result of their relationship (including that of employer/employee) to a U.S. citizen or lawful permanent resident. There are two types of beneficiaries: principal and derivative. As the name implies, a principal beneficiary is the foreign national on whose behalf the visa or petition is directly filed. In the case of an employer/employee relationship, for example, an employer would file a visa petition on behalf of the employee. The employee is the principal beneficiary. A derivative beneficiary is the spouse or child(ren) of the principal beneficiary. They are entitled to the same visa status as the principal beneficiary without the need for a separate visa petition filed on their behalf.

Petitioner: A person or entity who files a visa petition on behalf of a foreign national. The petitioner can be a U.S. citizen, lawful permanent resident, or employer, depending on the visa category.

both temporary and permanent work visa categories, thus opting for a principle of "selectivity" rather than a blanket ban on foreign workers.

Today, the INA contains five major work-related immigrant visa categories. Under these categories, a maximum of 140,000 employment-based immigrants with a broad array of skills and education can enter the United States annually, along with their immediate family members. Several but not all of the categories contain provisions intended to safeguard the interests of U.S. workers.

In addition to employment-based immigrants, foreign nationals admitted under any other immigrant visa category are authorized to work in the United States immediately. Immigrants who

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are sponsored by family members and refugees can work, for example, as can asylum seekers whose applications have been pending for more than six months. This chapter focuses only on the current employment-based permanent immigrant and non-permanent visa categories.

EB-1: PRIORITY WORKERS

The first employment-based preference category (EB-1) is for "priority workers," 40,000 of whom may be admitted annually. There are three groups of such workers: individuals with extraordinary ability; outstanding professors and researchers; and certain multinational executives and managers.

Altogether, 8,023 foreign nationals qualified as EB-1 priority workers in FY1993, and 8,097 in FY1994. An additional 13,091 and 12,956 spouses and children of EB-1 immigrants entered the United States in FY1993 and FY1994, respectively. Preliminary State Department data indicate that about 6,850 foreign nationals (and 10,900 spouses and children) were issued EB-1 visas in FY1995 (see figure **2-2**, p. 42).

The legislative history for this visa category indicates both the caliber of people that Congress intended to qualify for this group and the kind of documentation needed to demonstrate extraordinary ability:

> Documentation may include publications in respected journals, media accounts of the alien's contributions to his profession, and statements of recognition of exceptional expertise by qualified organizations. Recognition can be through a one-time achievement such as receipt of the Nobel Prize. An alien can also qualify on the basis of a career of acclaimed work in the field. In the case of the arts, the distinguished nature of the alien's career may be shown by critical reviews, prizes or awards received, box office standing or record sales. In short, admission under this category is to be reserved for that small percentage of individuals who have risen to the very top of their field of endeavor (U.S. House of Representatives 1990b:59).

EB-1-1: INDIVIDUALS WITH EXTRAORDINARY ABILITY

A prospective immigrant who has "extraordinary ability" in the sciences, arts, education, business, or athletics can qualify for the first subcategory of priority workers. The immigrant must have "extensive documentation" showing that his or her work has received "sustained national or international acclaim." Such foreign nationals do not have to have a specific job offer, as long as they are entering the United States to continue work in their field; they can file their own petition with the INS, rather than through an employer. Only 1,259 principal beneficiaries received EB-1-1 classification in FY1993, and 1,313 in FY1994.

EB-1-2: OUTSTANDING PROFESSORS AND RESEARCHERS

The second subcategory of priority workers is for outstanding professors and researchers who have at least three years' experience in teaching or research and who are "recognized internationally." The individual must be in a tenure-track or comparable position teaching or doing research at a university or affiliated private employer. Thus, this subcategory benefits mainly universities and colleges. Only employers can file petitions with the INS for outstanding professors and researchers; they cannot petition for themselves.

A petition for an outstanding professor or researcher must be accompanied by evidence that the person is recognized internationally as outstanding. The individual must meet two of the following six criteria:

- Documentation of the individual's receipt of major prizes or awards for outstanding achievement in the academic field;
- Documentation of the person's membership in academic associations that require outstanding achievements of their members;
- Material in professional publications written by others about the foreign national's work in the academic field;
- Evidence of the person's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;
- Evidence of the foreign national's original scientific or scholarly research contributions to the field; and
- Evidence of the individual's authorship of scholarly books or articles in academic journals with international circulation.[19]

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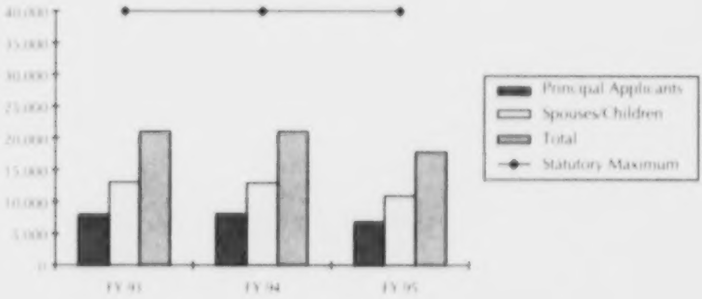
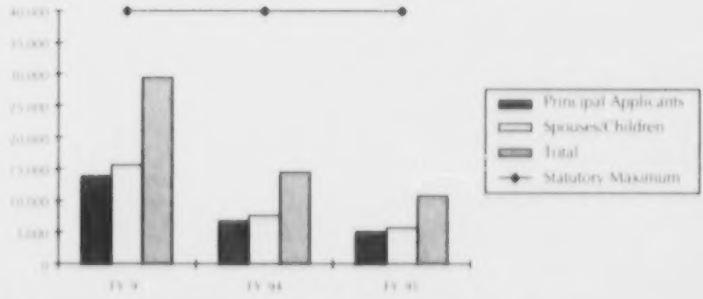
[19] Some of these criteria appear to defy a conventional definition of what constitutes even a promising *junior* professor or researcher in the United States. We agree with the intent of proposed INS regulations on this issue, which would tighten the criteria. For example, instead of allowing *any* published material written by others about the petitioner's work, the proposed rule would require that the publication "discusses or analyzes" the alien's work.

2-2. Employment-Based Immigrant Visa Admissions Under Current U.S. Law, FYs 1993–1995[a]

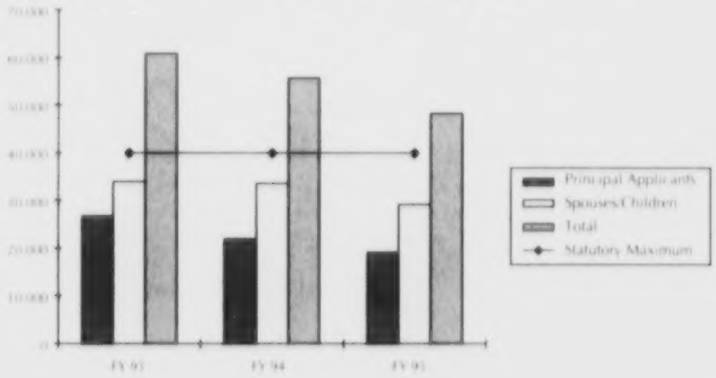
EB-1 Category (Priority Workers)



EB-2 Category (Advanced Degrees or Exceptional Ability)

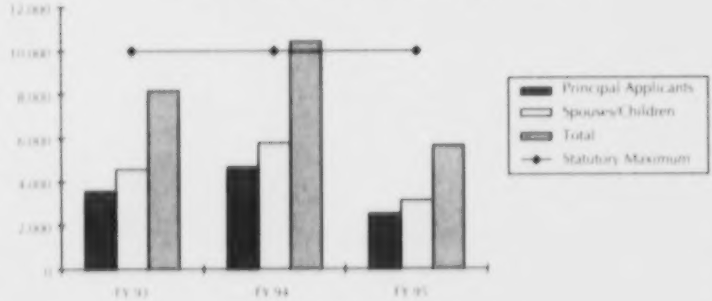


EB-3 Category (Professionals, Skilled Workers, and Unskilled Workers)

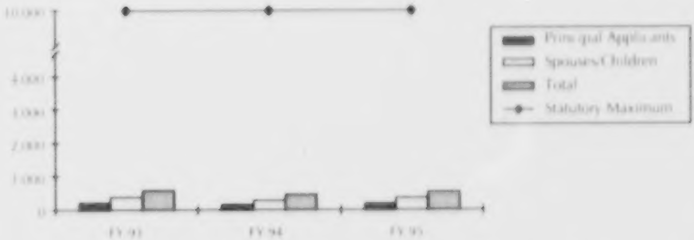


2-2. continued

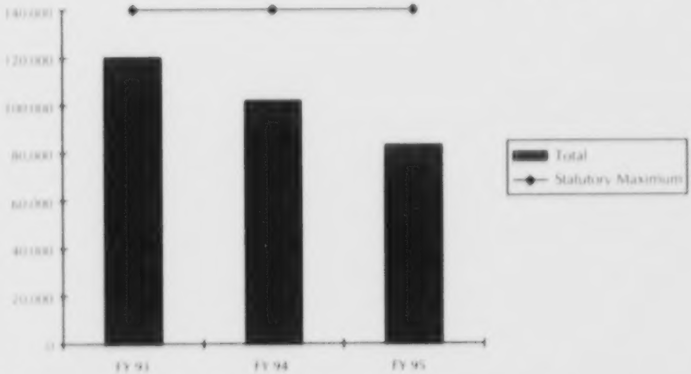
EB-4 Category (Special Immigrants)



EB-4 Category (Investors)



Grand Totals (Categories EB-1 through EB-5)



[a] Actual figures (not including admissions under the Chinese Student Protection Act) are used for fiscal years 1993 and 1994; in the absence of final data for fiscal year 1995, we use estimates. Because unused visas in the top two employment-based (EB) categories are transferable to the third EB category, the actual numbers used in the EB-3 category exceed the 40,000 annual total allocated specifically to that category.

Sources: U.S. Immigration and Naturalization Service and U.S. Department of State.

In FY1993, 1,676 people qualified as EB-1-2 outstanding professors and researchers; 1,809 qualified in FY1994. These numbers are minuscule compared with the total of about 800,000 professors in the United States. Moreover, according to the American Association of University Professors, that total includes only professors, not researchers. It is not known how many EB-1-2 beneficiaries are researchers working for private research organizations. The INS is currently conducting an analysis of all EB-1 petitions filed at the regional service centers, but the results of that study are not yet known.

EB-1-3: MULTINATIONAL EXECUTIVES AND MANAGERS

The third subcategory of priority workers is reserved for individuals who have been employed for at least one of the three preceding years by the overseas affiliate, parent, subsidiary, or branch of the petitioning U.S. employer. The individual must be coming to work in the United States in a managerial or executive capacity.

To be a *manager* under the EB-1-3 category, a person must: (a) manage an organization, department, subdivision, or function; (b) supervise and control the work of other supervisory, professional, or managerial employees, or else manage an "essential function"; (c) have the authority to make personnel decisions, or else function at "a senior level"; and (d) exercise discretion over the day-to-day operations of the activity or function for which he or she has authority.

To be an *executive* under the EB-1-3 category, a person must: (a) direct the management of an organization or major component or function; (b) have authority to establish goals and policies; (c) exercise wide latitude in discretionary decision-making; and (d) receive only general supervision from higher executives, the board of directors, or stockholders.

This subcategory is the one most used in the priority worker preference category. Some 5,088 foreign nationals qualified for EB-1-3 classification in FY1993, 4,975 in FY1994.[40]

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[40] These numbers should be compared to the non-immigrant L-1 visa category, which is also for certain multinational executives and managers, as well as for other intra-company transferees who have specialized knowledge. From FY1990 through FY1994, usage of the L-1 visa category increased 55 percent, from 63,180 to 98,177. This increase is not matched by any increase in the corresponding EB-1-3 immigrant visa category and probably reflects both the economy's increasing internationalization and the fact that adjustments in the category in 1990 facilitated the movement of such personnel, as intended.

EB-2: IMMIGRANTS WITH ADVANCED DEGREES OR EXCEPTIONAL ABILITY

The second employment-based immigrant visa preference category is for foreign nationals with advanced degrees or their equivalent in professional fields, or exceptional ability in the sciences, arts, or business. Forty thousand visas are available each year in the EB-2 category. A job offer *and* labor certification[41] are usually required, unless the Attorney General waives those requirements "in the national interest." [42]

Individuals in the "advanced degrees" category must have an advanced degree or its equivalent, defined in INS regulations as a bachelor's degree plus "at least five years progressive experience in the profession."

Legislative history notes that "exceptional ability" for EB-2 purposes refers "to persons who are particularly qualified in their callings, not simply to persons who have callings" (U.S. Senate 1989:55). To show that an individual has exceptional ability in the sciences, arts, or business, the INS requires meeting at least three of the following six criteria:

- An official academic record showing that the individual has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
- Evidence in the form of letter(s) from current or former employer(s) showing that the individual has at least ten years of full-time experience in the occupation for which he or she is being sought;
- A license to practice the profession, or certification for a particular profession or occupation;
- Evidence that the beneficiary has commanded a salary, or other remuneration for services, that demonstrates exceptional ability;
- Evidence of membership in professional associations; or
- Evidence of recognition for achievements and significant

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[41] Labor certification is discussed in more detail later in this chapter.

[42] In addition, up to 750 scientists of "exceptional ability" from the independent states of the former Soviet Union can be granted EB-2 visas under a special four-year program enacted in 1992. Neither a job offer nor labor certification is required. The program has been heavily under-subscribed. Only 62 former Soviet scientists were accorded EB-2 status under this legislation in FY1994.

contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The INS admitted 13,801 principal foreign nationals as EB-2 immigrants in FY1993, plus 15,667 spouses and children. In FY1994, 6,807 EB-2 principal immigrants (and 7,625 family members) were admitted, a decrease of over 50 percent. Preliminary data from the State Department indicate that only about 5,000 principal foreign nationals and 5,700 spouses and children entered the United States as EB-2 immigrants in FY1995.

Impressionistic evidence suggests that the admission of EB-2 immigrants in FY1994 and FY1995 is a better measure of demand than admission totals from earlier years. Until FY1994, there was much carryover and transition from pre-1990 Act cases and categories. Furthermore, in 1992 and 1993, some Chinese students with advanced degrees may inadvertently have been admitted under the EB-2 rather than the EB-3 category, as intended by the Chinese Student Protection Act of 1992 (see below).

EB-3: PROFESSIONALS AND SKILLED AND UNSKILLED WORKERS

The third employment-based preference is a catch-all category for other foreign nationals who have an offer of employment in the United States. This category requires in all instances both a job offer by an employer *and* a labor certification.

This category contains three broad subcategories: (a) professionals with a U.S. bachelor's degree or an equivalent foreign degree; (b) skilled workers, defined as individuals capable of performing a job requiring at least two years' training or experience; and (c) less-skilled "other workers," also referred to as *unskilled workers*. By law, only 10,000 of the 40,000 annual visas in this category are available to unskilled workers.

The INS admitted 26,778 principal immigrants in the EB-3 category in FY1993.[43] Of that total, 9,560 were professionals with bachelor's degrees, 12,813 were skilled workers, and 4,405 were unskilled workers. An additional 33,996 spouses and children of EB-3 immigrants were admitted that year.

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[43] This figure does not include an additional 26,915 individuals who were admitted as immigrants under the Chinese Student Protection Act of 1992 (CSPA), which allowed many nationals of the People's Republic of China who were primarily students in the United States to obtain permanent resident status. Immigrant visas issued under the CSPA were charged to the EB-3 category even though most of the beneficiaries had advanced degrees. Admissions under the CSPA are declining. They amounted to 21,297 in FY1994 and only 3,500 in FY1995.

In FY1994, the INS admitted 22,007 principal foreign workers as EB-3 immigrants, a decrease of 18 percent from the previous years. Of the FY1994 total, 7,732 were professionals with bachelor's degrees, 10,139 were skilled workers, and 4,136 were unskilled workers. An additional 33,652 spouses and children of EB-3 immigrants were admitted. The State Department estimates that in FY1995 about 19,100 principal foreign workers entered the United States as EB-3 immigrants, along with about 29,500 spouses and children. This represents a further decline of about 14 percent from the corresponding FY1994 figure.

EB-4: SPECIAL IMMIGRANTS

The fourth employment-based preference category is for certain special immigrants, as defined in INA §101(a)(27). These include such disparate groups as certain religious ministers and workers, certain overseas employees of the U.S. government, former employees of the Panama Canal Company and their families, foreign children who have been declared dependent on a juvenile court, and retired employees of international organizations and their families.

The INA allows 10,000 EB-4 visas annually. In FY1993, the INS admitted 8,158 EB-4 special immigrants, of whom over 64 percent were religious ministers, workers, and their families (867 religious ministers, 1,429 religious workers, and 2,904 spouses and children). In FY1994, the INS admitted 10,406 people in the EB-4 category, an increase of 27 percent from the previous year. Religious ministers (1,085 admissions), religious workers (2,495), and their families (4,366) accounted for 76 percent of the FY1994 total. Preliminary statistics from the State Department indicate that only about 5,675 persons entered the United States as EB-4 immigrants in FY1995. That represents a dramatic drop of almost 50 percent in one year, probably the result of an increase in the supply of U.S. religious workers. As before, religious workers probably account for a large percentage of that total.

EB-5: INVESTORS

To qualify for the fifth employment-based preference category, a foreign investor must establish or invest between $500,000 and $3 million in an existing or new commercial enterprise. The investment must create or save at least ten full-time jobs for U.S. citizens, permanent residents, or "other immigrants lawfully authorized to be employed in the United States," not including the investor or his or her immediate family. Permanent status is conditional on continuing to meet these criteria for two years.

The law provides 10,000 visas each year for the EB-5 category, of which 3,000 are reserved for investments in rural or high unemployment areas. The entire category is very underutilized, however. Just 196 EB-5 immigrant investors were admitted in FY1993, 157 in FY1994, and 180 in FY1995. An additional 387 spouses and children immigrated in that category in FY1993, and 287 in FY1994. As discussed more extensively in Chapter 4, the small number of applications in the EB-5 classification may be due to the INS's restrictive regulations.

LABOR CERTIFICATION

Most individuals seeking classification in the EB-2 or EB-3 immigrant visa categories must undergo what is known as "labor certification." This requirement stems from INA §212(a)(5), which prohibits most foreign nationals in these two categories from immigrating to the United States unless the DOL certifies that: (a) there are not enough U.S. workers willing, able, qualified, and available to perform the same work at the time and place where such work is to be performed; and (b) employing the foreign national will not adversely affect the wages and working conditions of similarly employed U.S. workers.

CERTIFICATION PROCEDURES

A prospective employer starts the labor certification process by describing the position and minimum prerequisites for the job, and the foreign worker's education and job experience. The information is filed with the state employment security agency (SESA), which coordinates the local recruitment process. At the close of the recruitment process, the state office sends the application to the certifying officer in the appropriate DOL region, of which there are ten. The regional certifying officer may either approve the labor certification or issue a Notice of Findings, listing possible deficiencies in the labor search or the job requirements. If the employer does not refute the Notice of Findings or if the rebuttal fails to persuade the certifying officer, labor certification is denied. A denial can be appealed to the DOL's Board of Alien Labor Certification Appeals. If unsuccessful at that administrative appeal stage, the employer and/or foreign worker can challenge the labor certification denial in federal district court. Assuming the labor certification application is eventually approved, the employer may then file a petition for immigrant visa classification with the INS.

Although the labor certification procedure sounds simple, as with most things the devil is in the details. The complexity and increasing irrelevance of the labor certification regulations (see box **2-3**, p. 50) regularly transform the process into a cat-and-mouse game between employers and immigration lawyers, on the one hand, and SESAs and the DOL, on the other. In the end, as discussed more fully in Chapter 3, motivated employers who are willing to invest the necessary time and money can almost always get their labor certification applications approved. Nevertheless, the percentage of labor certification approvals is declining, primarily due to emerging anti-immigrant attitudes, growing political pressure on the process, and a downturn in job openings in the early 1990s.

For example, 94 percent *of the applications that reached the final determination stage* were approved in FY1988.[34] The approval rate was higher each year until FY1993, when it dropped slightly to about 93 percent. Regions IV (including the deep southern states) and VIII (Colorado, Montana, the Dakotas, Utah, and Wyoming) usually ranked near the bottom in approval rates. Region II (New York, New Jersey, Puerto Rico, and the Virgin Islands) also produced relatively low approval rates, especially in FY1992 and FY1993 (see table **2-4**, p. 54).

Filings of labor certification applications have also declined—by almost 50 percent between FY1988 and FY1994—

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[34] The figures are quite different when looking at approvals of *all* labor certifications (see also fn. 46). For instance 84 percent of applications in FY1988 were approved. By FY1992, the rate was 70 percent, and it dropped further in FY1993 and 1994, to 62 percent and 64 percent, respectively.

2-3. THE CURRENT LABOR CERTIFICATION PROCESS

Over time, the labor certification process has become more and more complex. Here are some examples:

- **DOL regulations prohibit an employer from imposing unduly restrictive requirements in a labor certification application.** The reason is obvious. If the job requirements are too restrictive, U.S. workers will be discouraged from applying for the employment opportunity. Restrictive requirements include job duties that do not appear in the Dictionary of Occupational Titles (DOT), or minimum or special requirements that do not correspond to the norms enumerated in the specific vocational preparation (SVP) code for the job.

  If the DOL claims that the employer's job duties or requirements are restrictive, the employer can rebut the finding by: (a) providing objective documentation to prove that the job duties or requirements are not restrictive; or (b) proving that they are a "business necessity." To establish business necessity, the employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer.

  An example of a possible restrictive requirement is a foreign language requirement for a computer programmer. An employer may try to justify the requirement by claiming that it needs a computer programmer who knows Arabic because the company is trying to adapt an existing software program for the Middle Eastern market, and the programmer needs to speak with potential customers or other programmers in that region to learn what modifications need to be made. Whether the DOL will accept this rationale depends on the facts of the

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due mainly to restrictions in the number of visas available for unskilled workers after the 1990 Act. Thus, the DOL received 50,734 labor certification applications in FY1988, but in FY1992, just four years later, that number had dropped to only 34,607.

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case and how well the employer can document its claim of business necessity.

An employer also must not require more education, training, or experience than the employer required when he or she first hired the foreign worker or other workers in similar jobs. This means that the employer may not include experience that the beneficiary gained on the job unless the employer can demonstrate either (a) that it is not feasible to hire a worker with less than the qualifications presently required for the job opportunity; or (b) that the foreign worker gained the required experience working for the employer in jobs that are not similar to the job for which labor certification is sought. Trying to distinguish between "similar" and "dissimilar" jobs within the same company consumes huge amounts of time by the DOL, employers, and administrative law judges.

Complexities also arise in DOL's recruitment procedures for labor certification applications. In general, the recruitment procedures contain three elements: (a) a job order appears for 30 days in the computerized job pool of the area served by the SESA; (b) a job posting appears in the employer's place of business for at least 10 consecutive working days, advising workers of the job opportunity and asking interested applicants to apply; and (c) an advertisement for the position is published for three days in a newspaper of general circulation in the local area or in one issue of a journal or magazine appropriate to the industry. The DOL may specify the particular medium for advertising. The employer must also send notice of the labor certification filing to a union if an appropriate one exists in the area.

Overall, 219,452 applications reached DOL in the FY1988 to FY1993 period. The number peaked in FY1989, probably in response to the realization that the unskilled labor category would likely be substantially curtailed and to employer concerns about

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"labor shortages" for certain jobs. In FY1993, the number of applications decreased by an additional 4,500 (to 30,068) and in FY1994 the number, at 27,286, was lower still.

Despite these decreases, some state and federal DOL offices are still severely backlogged. The average processing time for a typical labor certification case in New York is almost two years, because of insufficient personnel at SESA and DOL levels in that region (DOL 1995c:36440). Even the fastest DOL region takes five or six months to decide an application (AILA 1995a:180), and INS processing at the federal level adds several more months (AILA 1995b:329-331). Understandably, given such backlogs, few potential employment-based immigrants wait outside the United States before beginning to work. A study conducted for the DOL in the late 1980s, for example, found that 90 percent were already working for their U.S. employer in one of the non-immigrant visa categories (described below) while they waited for the immigration process to run its course (REA 1990:5).

ANALYZING LABOR CERTIFICATION DATA

Although the available data are imperfect, they nonetheless make clear that the existing labor certification system is too blunt an instrument to perform its intended function—i.e., the protection of U.S. workers. The following analysis comes from a ground-breaking study of 1988-1993 data we conducted in 1994.[45]

In reviewing these data, it is important to note that the number of labor certification applications decided by the DOL is not the same as the number filed. Along the way, many applications drop out. The DOL estimates that 25 percent of all applications never make it to the federal level, either because the employer becomes discouraged and the application is withdrawn, the local SESA office finds problems with the application that the employer is unwilling or unable to fix, or the employer actually finds a U.S. worker through the recruitment process (though this rarely happens). Thus, in a sense, applications that would likely be denied may often be "weeded out" by the process itself, though no data are available to firm up this conclusion.[46] The absence of a firmer sense of why or how many labor certification applications are abandoned lends a bias to any analysis of the application pool, though we have attempted to draw what conclusions we could from the data available to us.

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[45] The cooperation of the Labor Department, and particularly that of the Division of Labor Certification, in making the raw data available to us is gratefully acknowledged.

REGIONAL DIFFERENCES

Table 2-4 (p. 54) offers a good picture of the geographical distribution of applicants. It shows that more applications were filed every year in California (in DOL Region IX) than in any other state. California's share of the total, however, dropped from 44 percent in FY1988 to 25 percent in FY1993, reflecting the poor condition of that state's labor market—including the labor market for professionals.

OCCUPATIONAL BREAKDOWNS

Tables 2-5, 2-6, and 2-7 switch the focus to occupational breakdowns. Table **2-5** (p. 58) lists the handful of occupations for each fiscal year that had the largest number of applications. The shift in the program's focus away from low-skill service occupations to professional and technical occupations is starkly evident both in this table and in figure **2-6** (p. 59), where one notices the sharp drop in applications for "houseworkers/cleaners" around 1990 and the gradual growth in professional occupations beginning at about the same time.

Figure 2-6 is also useful in pointing out three additional trends: (a) the sharp growth in applications for professional occupations (especially for "other computer-related occupations") beginning in 1992; (b) the resumption in growth of applications for "cook, specialty foreign food" after a two-year decline; and (c) the decline in applications for "systems analysts." The first trend probably reflects the economy's continued robust need for computer specialists, particularly as the economy started to grow again in 1992-1993. The second trend may be explained by the continuing need for specialty cooks and the occupation's success in obtaining

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[46] Regional offices send data only on applications that have reached a final determination. For this reason, the many intermediate actions taken on an application—especially the issuance of Notices of Findings and subsequent changes in the application by employers—are not reflected in the data. This makes calculation of success rates unreliable, since most of the applications that fail in the end are those in which the applicant cannot or will not make changes to rectify problems listed in the Notice of Findings.

2-4. Number of Labor Certification Applications and Approval Rates by State, Region, and Fiscal Year

REGION & STATE	FY 1988		FY 1989		FY 1990	
	Applications (Rank)	Percent Approved (Rank)	Applications (Rank)	Percent Approved (Rank)	Applications (Rank)	Percent Approved (Rank)
REGION I	**2,077 (4)**	**87.5 (7)**	**2,273 (4)**	**86.7 (7)**	**701 (6)**	**92.4 (9)**
Connecticut	432 (12)	80.1 (47)	513 (11)	82.3 (44)	88 (23)	87.5 (48)
Massachusetts	1,186 (8)	90.3 (31)	1,328 (8)	86.5 (36)	510 (11)	93.1 (36)
Maine	51 (31)	78.4 (48)	27 (44)	74.1 (48)	21 (42)	90.5 (44)
New Hampshire	198 (15)	93.4 (24)	177 (20)	97.2 (11)	15 (44)	100 (3)
Rhode Island	161 (16)	83.9 (41)	202 (18)	90.1 (31)	57 (34)	93.0 (37)
Vermont	49 (32)	83.7 (42)	26 (46)	96.2 (13)	10 (46)	90.0 (46)
REGION II	**7,528 (2)**	**94.1 (4)**	**13,551 (2)**	**95.5 (2)**	**14,299 (1)**	**96.0 (4)**
New Jersey	3,446 (3)	95.8 (18)	4,356 (3)	95.0 (17)	3,754 (3)	92.6 (40)
New York	3,775 (2)	92.6 (26)	9,156 (2)	95.7 (14)	10,475 (1)	97.3 (20)
Puerto Rico	32 (38)	93.8 (22)	32 (42)	81.3 (45)	59 (31)	93.2 (34)
Virgin Islands	5 (48)	60.0 (50)	7 (54)	85.7 (38)	11 (45)	90.9 (43)
REGION III	**6,851 (3)**	**98.4 (1)**	**11,129 (3)**	**99.0 (1)**	**5,861 (3)**	**98.5 (1)**
District of Columbia	1,214 (7)	97.8 (9)	1,676 (6)	98.7 (6)	725 (10)	96.8 (22)
Delaware	103 (21)	96.1 (16)	325 (15)	98.8 (5)	193 (15)	99.0 (11)
Maryland	1,859 (5)	99.0 (5)	3,365 (5)	99.3 (3)	2,276 (4)	99.0 (10)
Pennsylvania	1,047 (9)	97.7 (10)	1,558 (7)	98.3 (7)	789 (7)	98.1 (15)
Virginia	2,596 (4)	98.7 (7)	4,145 (4)	99.2 (4)	1,843 (5)	98.5 (13)
West Virginia	32 (39)	96.9 (14)	60 (38)	100 (1)	35 (38)	100 (1)
REGION IV	**34 (10)**	**85.3 (9)**	**1,200 (7)**	**80.4 (10)**	**181 (9)**	**87.9 (10)**
Alabama	1 (50)	100 (4)	18 (50)	66.7 (52)	29 (40)	100 (2)
Florida	21 (42)	76.2 (49)	510 (12)	94.1 (19)	7 (50)	85.7 (49)
Georgia	10 (47)	100 (2)	428 (14)	59.6 (54)	71 (28)	77.5 (50)
Kentucky	0 (51)	— (51)	27 (45)	85.2 (40)	30 (39)	96.7 (24)
Mississippi	0 (52)	— (52)	20 (49)	100 (2)	0 (53)	— (53)
North Carolina	2 (49)	100 (3)	103 (29)	92.2 (20)	4 (51)	100 (6)
South Carolina	0 (54)	— (54)	25 (47)	68.0 (51)	40 (37)	90.0 (45)
Tennessee	0 (53)	— (53)	69 (34)	91.3 (25)	0 (52)	— (52)
REGION V	**1,495 (6)**	**92.8 (5)**	**1,608 (5)**	**94.0 (4)**	**2,362 (4)**	**98.4 (2)**
Illinois	558 (10)	89.6 (33)	572 (10)	90.2 (30)	730 (9)	98.0 (16)
Indiana	94 (22)	90.4 (30)	108 (28)	97.2 (10)	145 (17)	97.2 (21)
Michigan	434 (11)	96.1 (17)	491 (13)	97.2 (12)	773 (8)	98.5 (14)

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FY 1991		FY 1992		FY 1993		REGION & STATE
Applications (Rank)	Percent Approved (Rank)	Applications (Rank)	Percent Approved (Rank)	Applications (Rank)	Percent Approved (Rank)	
846 (7)	**89.7 (10)**	**1,698 (7)**	**96.7 (5)**	**1,301 (6)**	**95.8 (1)**	**REGION I**
220 (19)	76.4 (53)	423 (16)	96.5 (29)	316 (15)	94.0 (29)	Connecticut
535 (10)	95.7 (22)	1,090 (8)	97.5 (18)	806 (10)	96.8 (12)	Massachusetts
15 (50)	100 (4)	36 (47)	88.9 (50)	25 (49)	96.0 (19)	Maine
33 (46)	84.9 (49)	60 (42)	90.0 (49)	52 (41)	92.3 (34)	New Hampshire
32 (48)	84.4 (50)	49 (43)	95.9 (35)	76 (34)	96.1 (17)	Rhode Island
11 (53)	81.8 (51)	40 (46)	95.0 (43)	26 (48)	92.3 (35)	Vermont
11,368 (1)	**94.5 (4)**	**7,246 (2)**	**90.3 (10)**	**6,324 (2)**	**90.1 (9)**	**REGION II**
2,851 (3)	93.7 (32)	1,937 (5)	88.3 (52)	1,896 (3)	91.7 (38)	New Jersey
8,463 (2)	94.8 (26)	5,265 (2)	91.0 (48)	4,394 (2)	89.4 (44)	New York
44 (43)	90.9 (43)	35 (49)	97.1 (24)	28 (47)	96.4 (16)	Puerto Rico
10 (54)	80.0 (52)	9 (54)	88.9 (51)	6 (53)	100 (4)	Virgin Islands
6,998 (3)	**97.8 (2)**	**6,069 (3)**	**96.5 (7)**	**4,422 (3)**	**92.7 (7)**	**REGION III**
921 (8)	97.5 (14)	783 (12)	95.4 (39)	614 (11)	94.5 (28)	District of Columbia
148 (22)	98.0 (12)	165 (26)	97.6 (17)	61 (37)	95.1 (24)	Delaware
2,283 (5)	96.5 (17)	2,024 (3)	96.7 (27)	1,296 (4)	93.8 (31)	Maryland
1,215 (7)	99.5 (5)	1,052 (10)	98.0 (14)	1,041 (7)	86.3 (49)	Pennsylvania
2,324 (4)	98.1 (9)	1,966 (4)	95.7 (37)	1,288 (5)	95.6 (22)	Virginia
107 (30)	100 (1)	79 (36)	100 (2)	122 (27)	96.7 (13)	West Virginia
1,812 (4)	**92.5 (8)**	**2,640 (5)**	**97.1 (3)**	**2,310 (5)**	**92.0 (8)**	**REGION IV**
232 (17)	91.4 (41)	221 (22)	97.3 (20)	151 (24)	96.0 (18)	Alabama
751 (9)	93.6 (34)	1,066 (9)	97.3 (21)	1,077 (6)	91.2 (40)	Florida
267 (15)	87.6 (46)	436 (14)	92.6 (47)	340 (14)	85.3 (51)	Georgia
68 (37)	94.1 (31)	95 (34)	99.0 (7)	118 (29)	97.5 (8)	Kentucky
43 (44)	93.0 (36)	77 (37)	96.1 (33)	59 (39)	91.5 (39)	Mississippi
267 (16)	93.6 (33)	430 (15)	98.6 (8)	295 (17)	96.6 (14)	North Carolina
58 (39)	91.4 (42)	118 (30)	100 (1)	92 (31)	93.5 (32)	South Carolina
126 (25)	95.2 (25)	197 (23)	99.5 (6)	178 (20)	94.9 (25)	Tennessee
1,616 (6)	**96.9 (3)**	**4,163 (4)**	**96.7 (6)**	**2,531 (4)**	**94.4 (3)**	**REGION V**
528 (11)	96.2 (19)	1,819 (6)	96.1 (34)	939 (9)	91.9 (36)	Illinois
83 (35)	97.6 (13)	274 (18)	98.2 (10)	312 (16)	97.1 (10)	Indiana
494 (12)	97.0 (15)	1,032 (11)	97.0 (25)	611 (12)	95.6 (21)	Michigan

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REGION & STATE	FY 1988		FY 1989		FY 1990	
	Applications (Rank)	Percent Approved (Rank)	Applications (Rank)	Percent Approved (Rank)	Applications (Rank)	Percent Approved (Rank)
Minnesota	92 (24)	96.7 (15)	133 (22)	91.0 (26)	157 (16)	97.5 (18)
Ohio	223 (14)	91.5 (27)	176 (21)	95.5 (15)	421 (12)	99.5 (8)
Wisconsin	94 (23)	98.9 (6)	128 (24)	97.7 (9)	136 (18)	99.3 (9)
REGION VI	**1725 (5)**	**85.9 (8)**	**1,485 (6)**	**89.9 (6)**	**1,253 (5)**	**92.9 (8)**
Arkansas	37 (36)	97.3 (12)	36 (40)	91.7 (24)	60 (29)	31.7 (51)
Louisiana	126 (18)	84.9 (39)	109 (27)	90.8 (28)	135 (19)	97.8 (17)
New Mexico	68 (27)	89.7 (32)	67 (35)	89.6 (34)	49 (36)	95.9 (26)
Oklahoma	119 (19)	80.7 (46)	99 (30)	90.9 (27)	57 (35)	96.5 (25)
Texas	1,375 (6)	85.9 (38)	1,174 (9)	89.6 (33)	952 (6)	95.7 (30)
REGION VII	**203 (9)**	**91.6 (6)**	**447 (8)**	**81.7 (9)**	**418 (7)**	**94.5 (6)**
Iowa	65 (28)	89.2 (34)	112 (25)	80.4 (46)	87 (24)	98.9 (12)
Kansas	42 (34)	88.1 (35)	92 (32)	73.9 (49)	60 (30)	96.7 (23)
Missouri	60 (29)	93.3 (25)	205 (17)	85.4 (39)	213 (14)	93.0 (38)
Nebraska	36 (37)	97.2 (13)	38 (39)	84.2 (42)	58 (33)	91.4 (42)
REGION VIII	**246 (8)**	**84.2 (10)**	**226 (10)**	**85.0 (8)**	**277 (8)**	**93.5 (7)**
Colorado	117 (20)	84.6 (40)	110 (26)	91.8 (23)	129 (20)	94.6 (33)
Montana	12 (44)	83.3 (43)	10 (53)	90.0 (32)	90 (22)	92.2 (41)
North Dakota	22 (41)	86.4 (37)	11 (51)	63.6 (53)	20 (43)	95.0 (32)
South Dakota	11 (45)	90.9 (28)	11 (52)	72.7 (50)	28 (41)	92.9 (39)
Utah	73 (26)	80.8 (45)	63 (36)	76.2 (47)	0 (54)	— (54)
Wyoming	11 (46)	90.9 (29)	21 (48)	90.5 (29)	10 (47)	90.0 (47)
REGION IX	**16,571 (1)**	**94.3 (3)**	**19,095 (1)**	**94.7 (3)**	**10,467 (2)**	**95.3 (5)**
Arizona	287 (13)	93.7 (23)	224 (16)	97.8 (8)	122 (21)	95.9 (27)
California	16,141 (1)	94.3 (21)	18,634 (1)	94.7 (18)	10,087 (2)	95.2 (31)
Guam	42 (35)	97.6 (11)	99 (31)	84.9 (41)	73 (26)	95.9 (28)
Hawaii	43 (33)	95.4 (20)	63 (37)	88.9 (35)	306 (13)	99.7 (7)
Nevada	58 (30)	81.0 (44)	75 (33)	92.0 (22)	59 (32)	93.2 (35)
REGION X	**290 (7)**	**95.9 (2)**	**396 (9)**	**91.9 (5)**	**164 (10)**	**97.0 (3)**
Alaska	16 (43)	100 (1)	28 (43)	85.7 (37)	8 (48)	100 (4)
Idaho	23 (40)	87.0 (36)	35 (41)	82.9 (43)	8 (49)	100 (5)
Oregon	92 (25)	97.8 (8)	131 (23)	95.4 (16)	72 (27)	95.8 (29)
Washington	159 (17)	95.6 (19)	202 (19)	92.1 (21)	76 (25)	97.4 (19)
GRAND TOTAL	**36,750**	**94.10**	**51,410**	**94.79**	**36,163**	**96.10**

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FY 1991		FY 1992		FY 1993		REGION & STATE
Applications (Rank)	Percent Approved (Rank)	Applications (Rank)	Percent Approved (Rank)	Applications (Rank)	Percent Approved (Rank)	
81 (36)	96.3 (18)	180 (25)	95.6 (38)	121 (28)	90.1 (43)	Minnesota
307 (14)	98.1 (11)	588 (13)	96.9 (26)	365 (13)	95.6 (20)	Ohio
123 (26)	96.8 (16)	270 (19)	98.2 (11)	183 (19)	98.4 (6)	Wisconsin
1,639 (5)	**98.5 (1)**	**1,938 (6)**	**97.8 (1)**	**1,283 (7)**	**95.4 (2)**	**REGION VI**
48 (41)	100 (3)	48 (44)	95.8 (36)	30 (46)	86.7 (48)	Arkansas
157 (21)	99.4 (6)	183 (24)	96.7 (28)	129 (26)	96.9 (11)	Louisiana
47 (42)	95.7 (21)	47 (45)	97.8 (16)	41 (43)	90.2 (41)	New Mexico
103 (31)	98.1 (10)	106 (32)	98.1 (12)	75 (35)	98.7 (5)	Oklahoma
1,284 (6)	98.4 (8)	1,554 (7)	98.0 (13)	1,008 (8)	95.4 (23)	Texas
477 (9)	**93.9 (6)**	**489 (9)**	**95.7 (8)**	**342 (9)**	**93.9 (5)**	**REGION VII**
84 (34)	91.7 (40)	80 (35)	95.0 (42)	82 (33)	92.7 (33)	Iowa
115 (27)	92.2 (38)	103 (33)	96.1 (32)	61 (38)	90.2 (42)	Kansas
223 (18)	94.2 (30)	233 (21)	94.4 (45)	168 (22)	94.6 (26)	Missouri
55 (40)	100 (2)	73 (38)	100 (3)	31 (45)	100 (1)	Nebraska
321 (10)	**92.8 (7)**	**402 (10)**	**96.8 (4)**	**305 (10)**	**89.5 (10)**	**REGION VIII**
146 (23)	95.9 (20)	159 (27)	96.2 (30)	167 (23)	88.6 (45)	Colorado
25 (49)	92.0 (39)	14 (53)	85.7 (53)	16 (51)	100 (2)	Montana
33 (47)	87.9 (45)	36 (48)	94.4 (44)	24 (50)	66.7 (53)	North Dakota
13 (52)	53.9 (54)	34 (50)	100 (4)	9 (52)	100 (3)	South Dakota
89 (33)	95.5 (23)	138 (29)	98.6 (9)	84 (32)	96.4 (15)	Utah
15 (51)	93.3 (35)	21 (52)	95.2 (41)	5 (54)	60.0 (54)	Wyoming
10,044 (2)	**94.2 (5)**	**7,717 (1)**	**94.8 (9)**	**6,999 (1)**	**93.6 (6)**	**REGION IX**
219 (20)	95.4 (24)	261 (20)	96.2 (31)	149 (25)	97.3 (9)	Arizona
9,542 (1)	94.2 (29)	7,213 (1)	95.4 (40)	6,634 (1)	93.9 (30)	California
108 (29)	99.1 (7)	67 (40)	23.9 (54)	71 (36)	67.6 (52)	Guam
113 (28)	94.7 (27)	110 (31)	97.3 (22)	98 (30)	91.8 (37)	Hawaii
62 (38)	85.5 (48)	66 (41)	93.9 (46)	47 (42)	87.2 (46)	Nevada
596 (8)	**90.6 (9)**	**596 (8)**	**97.7 (2)**	**505 (8)**	**94.3 (4)**	**REGION X**
90 (32)	86.7 (47)	73 (39)	97.3 (23)	54 (40)	87.0 (47)	Alaska
36 (45)	94.4 (28)	29 (51)	100 (5)	36 (44)	86.1 (50)	Idaho
130 (24)	92.3 (37)	149 (28)	98.0 (15)	173 (21)	97.7 (7)	Oregon
340 (13)	90.6 (44)	345 (17)	97.4 (19)	242 (18)	94.6 (27)	Washington
35,717	**95.03**	**32,958**	**94.92**	**26,322**	**92.71**	**GRAND TOTAL**

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2-5. Occupations with the Most Labor Certification Applications in Each Fiscal Year, FYs 1988–1993

Occupation	Applications
FY1988	
General Houseworker or Cleaner	8,043
Cook, Specialty, Foreign Food	1,761
Faculty Member, College or University	1,468
Programmer, Systems Analyst/Engineer, or Software Engineer	1,287
Cook	482
Chemist or Electronics/Electrical/Mechanical Engineer	436
FY1989	
General Houseworker or Cleaner	11,549
Cook, Specialty, Foreign Food	2,723
Programmer, Systems Analyst/Engineer, or Software Engineer	2,045
Faculty Member, College or University	1,780
Sewing or Lockstich Machine Operator	1,535
Cook	482
FY1990	
General Houseworker or Cleaner	9,994
Programmer, Systems Analyst/Engineer, or Software Engineer	1,946
Faculty Member, College or University	1,739
Cook, Specialty, Foreign Food	1,588
Scientist or Electronics/Electrical/Mechanical Engineer	833
Accountant	462
FY1991	
General Houseworker or Cleaner	7,661
Programmer, Systems Analyst/Engineer, or Software Engineer	2,809
Faculty Member, College or University	2,283
Cook, Specialty, Foreign Food	1,121
Scientist or Electronics/Electrical/Mechanical Engineer	526
FY1992	
Programmer, Systems Analyst/Engineer, or Software Engineer	3,062
General Houseworker or Cleaner	2,834
Faculty Member, College or University	2,686
Scientist or Electronics/Electrical/Mechanical Engineer	1,622
Cook, Specialty, Foreign Food	1,022
FY1993	
Programmer, Systems Analyst/Engineer, or Software Engineer	2,859
Faculty Member, College or University	1,671
Cook, Specialty, Foreign Food	1,408
General Houseworker or Cleaner	1,229
Scientist or Electronics/Electrical/Mechanical Engineer	1,056

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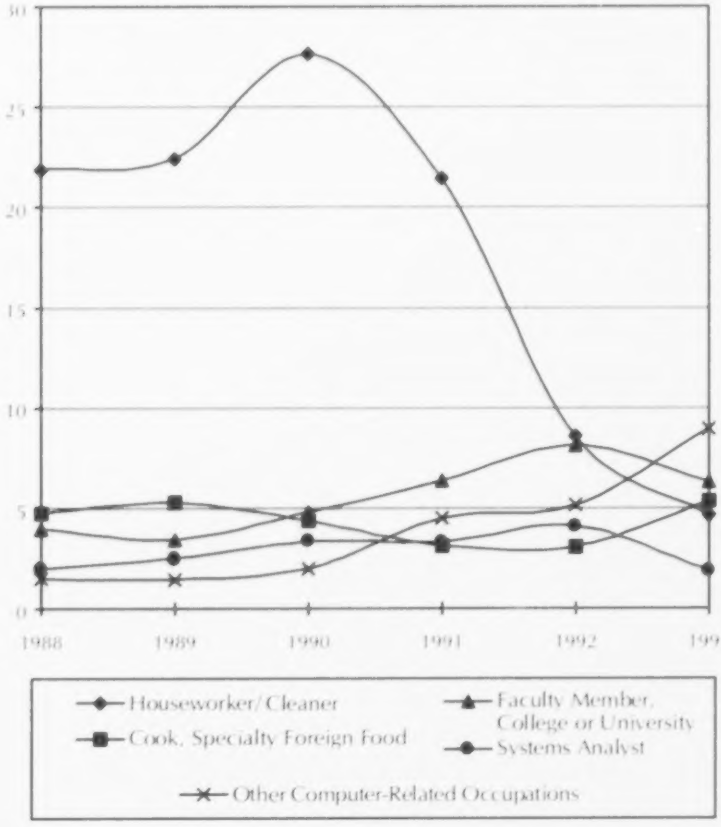
certifications during the 1990-1992 period—a fact that typically encourages more applications. The third trend may suggest that the supply of U.S. system analysts is catching up with demand, apparently unlike the case with the more volatile labor market for other computer occupations, particularly computer programmers. Of course, as is argued in this chapter, success in the labor certification process is an extremely unreliable measure of the true *supply* of workers in most occupations.

2-6. Applications for Selected Occupations, as a Percentage of All Labor Certification Applications, FYs 1988–1993



For purposes of this analysis, we have classified applications according to the first digit of the Dictionary of Occupational Titles (DOT) code, which is 0 or 1 for professional, technical and managerial occupations, 3 for service occupations, and so on. In FY1988, the applicant pool was nearly evenly divided among three general types: professional, technical, and managerial occupations; service occupations; and all others. By FY1993, however, nearly two-thirds of the applicants were in the 0 and 1 category.

The clearest evidence of the occupational shift appears in figure **2-7** (p. 61), which classifies applicants according to DOL's measure of "specific vocational preparation" (SVP) for each occupation (i.e., each DOT code number).[47] The DOL determines the SVP for each of the nine-digit occupations by grouping them according to the amount of training generally required for each. There are actually nine SVP categories, representing standard training times that range from "short demonstration only" (SVP=1) to "more than ten years" of combined education, training, and experience (SVP=9). To simplify the analysis somewhat, we aggregated these nine small categories into three larger ones—those requiring less than three months training, 3 to 24 months, and more than 24 months. Figure 2-7 and table 2-8 display these aggregated summary data and a breakdown for selected states, respectively.

Clearly, the occupations for which labor certification applications were received required more skills and training over the years. As figure 2-7 illustrates, in FY1988, just over half of all applications nationally were to fill jobs requiring two years of training or more, and a quarter were for jobs that required practically no training. However, by FY1993, and as intended by the 1990 legislation, a full 81 percent of applications involved occupations with an SVP of two or more years.

Table **2-8** (p. 62) shows how the skill distribution of labor certification applications changed from 1988 to 1993 in selected states. Again, the effects of the 1990 Act are evident. In all states,

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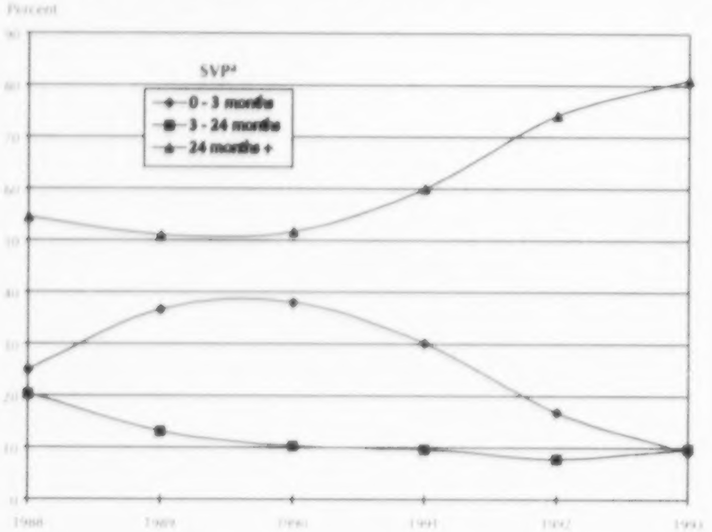
[47] The DOL defines SVP as "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation" (DOL 1991:8-1). The SVP is important in the current labor certification system because the DOL looks askance at employers who require more education, training, or experience for a particular job than the average SVP listed for that occupation in the DOT.

2-7. Skill Distribution of Labor Certification Applicants Nationwide, FYs 1988–93



SVP	1988	1989	1990	1991	1992	1993
0-3 months	25.1	36.7	38.0	30.2	16.9	9.2
3-24 months	20.4	13.2	10.3	9.7	7.9	9.8
24 months +	54.5	51.1	51.7	60.1	74.2	81.0

[a] The DOL defines SVP—specific vocational preparation—as "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the faculty needed for average performance in a specific job-worker situation." (DOL 1991: 8-1).

the trend has been toward more highly skilled applicants. California, Texas, and Florida received a disproportionately small share of low-skilled occupations. On the other hand, most East Coast states experienced the opposite, receiving a relatively large share of low-skilled–occupation applications. The explanation probably lies in large part with the fact that the southern border states and Florida receive very large numbers of their immigrants through the family reunification and refugee/asylum streams (disproportionate shares of whom come from Mexico and Central America)—as well as by far the country's largest share of unauthorized immigrants. This combination of immigration categories, type of entry, and source countries typically translates into adequate numbers of lower-

2-8. Skill Distribution of Labor Certification Applicants in Selected States, FYs 1988 and 1993

State	SVP[a] in FY1988 (Percentages)			SVP[a] in FY1993 (Percentages)		
	0 - 3 months	3 - 24 months	24 months +	0 - 3 months	3 - 24 months	24 months +
California	26.478	16.268	57.254	6.748	13.860	79.392
District of Columbia	42.274	12.243	45.483	16.044	13.913	70.043
Florida	5.556	22.222	72.222	4.618	11.687	83.695
Illinois	5.138	7.156	87.706	6.538	5.038	88.424
Massachusetts	8.000	5.739	86.261	4.993	7.692	87.314
Maryland	56.313	11.161	32.525	27.016	14.017	58.966
Michigan	1.874	2.576	95.550	1.149	3.120	95.731
New Jersey	0.000	97.727	2.273	5.945	9.236	84.820
New York	0.182	81.802	18.016	16.225	12.454	71.321
Ohio	2.715	2.715	94.570	1.944	2.500	95.556
Pennsylvania	25.561	8.780	65.659	15.652	4.928	79.420
Texas	7.782	10.406	81.812	1.982	3.705	94.403
Virginia	55.944	11.889	32.167	17.225	11.458	71.317
Washington	3.871	7.097	89.032	0.830	4.149	95.021

[a] The DOL defines SVP—specific vocational preparation—as "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the faculty needed for average performance in a specific job-worker situation." (DOL 1991: 8-1).

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skilled immigrants for filling the demand for low-wage jobs. In contrast, the East Coast, with smaller numbers and a different mix of immigrants, apparently continues to experience a significant demand for low-skilled immigrants.

MACROECONOMIC LINKAGES

We also attempted to assess the relationship of labor certification filings or approval rates to macroeconomic conditions. To do so, we linked data from the DOL labor certification database with state-level macroeconomic and demographic time-series data from the Census Bureau and the DOL's Bureau of Labor Statistics. Since the plethora of missing and invalid data throughout the DOL database makes precise inferences extremely difficult and open to doubt, we are only able to discuss relationships among the variables in gross, tentative terms.

Our regression analysis[48] suggests that increases in a state's unemployment rate have generally been accompanied by decreases in the proportion of labor certifications to that state's employed population, although typically with a time lag of three months or so, indicating a good bit of inertia in the system.[49] These findings demonstrate that certification petitions are somewhat sensitive to economic conditions in a state, as measured by unemployment rates. In the last few years, the rate of approvals has also shown a similar tendency to fall when unemployment is higher. The analysis also suggests that the responsiveness of the labor certification system to changes in the rate of employment growth is slow and incremental. In fact, as a state's labor market expands, the labor certification program for the next two months seems to restrict further the number of foreign workers that enter the workforce. Regardless of how one interprets this result—as a failure to respond to "labor shortages" created by excess demand or as a valid mechanism for giving a short "preference" to local workers—the conclusion that the certification suffers from very substantial inertia is inescapable.

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[48] Special modifications of the data were necessary for this analysis. Labor certifications in each state in each month during FYs 1988–1993 were counted and then divided by the number of people employed in that state in that month. This variable became the model's dependent variable and was regressed on a combination of seasonally adjusted unemployment rates for the relevant state and month, the rate of employment growth, twelve of its own lags, and four lags each of the unemployment and employment growth rates. Three of the six models used ordinary least-squares regression; in the other three, the fixed-effects estimator was chosen to estimate coefficients on state dummy variables. The models control for unmeasurable differences across states to account for inertia in the process over time, to allow for an adjustment period during which the labor certification program "catches up" with the labor market, and to see whether these differences were significant.

[49] The time lag is readily explainable by the immigration system's long pipelines and backlogs in priority dates during most of the observation period. When the priority date backlogs all but disappeared in most employment-based categories by FY1993, the relationship became stronger.

To summarize, the regression analysis shows the following:

- The number of successful labor certifications in a state seems to respond somewhat to changes in the unemployment rate;
- This response is consistent with the program's fulfilling its objective of restricting foreign workers' access to the U.S. labor market when more U.S. workers are unemployed;
- The program is less responsive to changes in the rate of employment growth;
- There is considerable "inertia" in the program's operations, as the number of certifications in a given month correlate most systematically with the number of certifications for most of the previous twelve months;
- The program can take up to three months to adjust to changes in the state labor market; and
- There is considerable variation in the number of certifications across states, even when states' economic differences are taken into account.

DATA ON WAGES

A final area where we tried to test the data's ability to shed light was on wages. Here, the relevant cohort is *approved* applications, since many applications were presumably denied for the very reason that the wage offered is lower than the *prevailing wage*, which the DOL defines as a wage that is within 5 percent of the average wage for U.S. workers "similarly employed."[50]

In table **2-9** (p. 66), we attempt to compare the average wage offered to aliens in local (state-occupation) labor markets to the mean, median, and 45th percentiles of the native wage distributions in those labor markets. To do so, we converted wages reported on applications to an hourly basis, so they could be compared with labor market data from the census. The hourly wages were then averaged within state-occupation labor markets and merged with census-generated mean, median, and 45th percentile wages from those labor markets. Many small occupational groups with less than 30 observations in the census' one percent Public Use Microsampling (PUMS) have been discarded from the analysis. *We have also omitted the thousands of labor markets in which the average wage offered exceeded the 45th percentile, since these met the "prevailing wage" test.*

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[50] Some exceptions are made for workers employed under a contract negotiated by a union, or workers whose occupations are subject to prevailing wage determinations under other federal laws.

A few important caveats must precede the discussion of this table, since both census and DOL data are severely limited. First, there is no way to control for skills, education, and labor market experience in both data sets simultaneously, since the DOL data contain no information on aliens' education or work history, and the census data do not contain SVP. The analysis thus had to aggregate all workers in an occupation, regardless of skill or experience, and it suffers somewhat as a result. Second, since the DOL data contain no finer geographic detail than the state level, it is impossible to distinguish among (potentially very different) labor markets within large states (especially California), even though the census reports data at the metropolitan-area level. To make matters worse, it is also impossible to measure the degree of bias that these limitations impose on the analysis. Finally, and along somewhat different lines, the DOL and SESA officials who adjudicate applications rarely use census or other data collected by the federal government in determining prevailing wages. A common alternative is a local employer survey, performed with varying degrees of formality and statistical precision. In practice, many different methods of wage determination are used. Thus, other ways of measuring the prevailing wage—which may be better or worse, depending on the situation—could well yield different results.

Table 2-9 lists all state-occupation labor markets in which the average wage offered to aliens on *approved* labor certification applications during FY1988 to FY1990 was less than the 45th percentile wage in that labor market. With all the caveats highlighted above, the table shows that the "problem" of certified applications involving the offering of wages below the 45th percentile—if there is indeed a significant "problem" considering the few instances that these were identified—is fairly evenly distributed across occupations, from low-skill to high-skill occupations. This situation is disproportionately represented in occupation group 407 (private household cleaners and servants) in the mid-Atlantic states. In

2-9. Occupation Labor Markets, by States in which Mean Wage Offered on Certified Applications is Lower than 45th Percentile of Average Labor Market Wage Distribution, FYs 1988–1990

Group Code	Occupational Group Title	States	Approved	Mean Wage Offered ($/hr)	Labor Market 45th %ile ($/hr)	Labor Market Median Wage ($/hr)	Labor Market Mean Wage ($/hr)
013	Managers (Marketing, Advertising, and Public Relations)	NJ	49	16.29	22.54	23.01	25.92
044	Aerospace Engineers	OH	48	17.59	21.83	22.81	22.85
048	Chemical Engineers	TX	64	17.88	21.83	22.66	22.06
053	Civil Engineers	MA	50	15.61	18.34	19.20	19.73
	Civil Engineers	NJ	41	14.82	21.60	23.04	23.35
	Civil Engineers	NY	52	16.98	18.43	19.93	20.91
	Civil Engineers	TX	51	13.61	17.83	19.39	20.21
055	Electrical and Electronic Engineers	FL	38	18.69	19.28	20.24	19.92
	Electrical and Electronic Engineers	MA	486	19.14	19.88	20.82	21.59
	Electrical and Electronic Engineers	MI	239	18.49	18.73	19.49	19.20
	Electrical and Electronic Engineers	NJ	137	21.13	21.51	22.47	23.61
	Electrical and Electronic Engineers	NY	84	19.78	20.24	21.20	21.46
	Electrical and Electronic Engineers	OH	44	15.65	18.77	18.89	19.14
056	Industrial Engineers	MI	37	14.09	16.07	17.97	18.95
	Industrial Engineers	NY	39	11.56	16.00	17.06	18.22
057	Mechanical Engineers	MY	280	13.14	20.06	21.62	21.43
	Mechanical Engineers	NJ	36	17.74	19.40	20.37	19.90
	Mechanical Engineers	NY	46	16.94	18.43	19.42	20.35
	Mechanical Engineers	OH	39	16.45	16.52	16.99	18.86

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064	**Computer Systems Analysts and Scientists**	**NJ**	**437**	**15.24**	**19.62**	**20.58**	**21.64**
	Computer Systems Analysts and Scientists	**NY**	**761**	**16.28**	**18.62**	**19.96**	**20.57**
073	**Chemists (except Biochemists)**	**NJ**	**39**	**17.23**	**18.14**	**19.62**	**20.11**
	Chemists (except Biochemists)	NY	66	14.70	16.95	17.76	19.60
	Chemists (except Biochemists)	TX	75	11.58	14.86	15.34	16.23
075	Geologists and Geodeisists	TX	34	18.60	18.80	20.61	21.75
084	Physicians	MI	38	22.98	24.99	28.82	33.55
096	Pharmacists	TX	52	14.02	18.07	18.54	16.17
157	Teachers (Secondary School)	NY	223	13.01	17.39	18.57	18.37
166	Economists	NJ	32	13.27	16.89	18.09	20.27
174	Social Workers	NY	34	12.16	12.56	13.49	14.01
229	Computer Programmers	NJ	47	15.65	18.04	19.33	19.74
	Computer Programmers	TX	51	14.12	15.12	16.13	15.76
406	Child Care Workers (Private Household)	MD	206	4.07	4.13	4.75	5.68
407	**Private Household Cleaners and Servants**	**MD**	**2,102**	**4.10**	**5.37**	**5.95**	**6.91**
	Private Household Cleaners and Servants	**NJ**	**3,006**	**6.14**	**6.19**	**7.90**	**9.48**
	Private Household Cleaners and Servants	**NY**	**7,687**	**4.99**	**5.12**	**5.91**	**7.40**
	Private Household Cleaners and Servants	**VA**	**1,495**	**3.91**	**4.61**	**5.12**	**5.91**
433	Supervisors; Food Preparation and Service Occupations	NY	82	5.61	6.23	7.23	9.94
443	Waiters/Waitresses Assistants	VA	184	4.20	4.29	4.58	6.05
46A	Personal Service Occupations (Residual)	NJ	41	8.88	10.01	11.03	12.59
507	Bus, Truck, and Stationary Engine Mechanics	NY	35	8.43	11.32	11.92	13.39
	Bus, Truck, and Stationary Engine Mechanics	PA	36	3.59	9.23	9.88	10.61
50A	Automobile Mechanics, including Apprentices	VA	42	7.44	7.98	8.75	9.61
514	Automobile Body and Related Repairers	NY	142	7.68	7.80	8.41	9.01

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2-9. continued

Group Code	Occupational Group Title	States	Approved	Mean Wage Offered ($/hr)	Labor Market 45th %ile ($/hr)	Labor Market Median Wage ($/hr)	Labor Market Mean Wage ($/hr)
526	Household Appliance and Power Tool Repairers	CA	40	6.06	8.67	9.75	9.66
53A	Other Mechanics and Repairers (except Supervisors)	MD	48	10.25	11.72	12.74	12.42
	Other Mechanics and Repairers (except Supervisors)	NJ	102	10.35	13.11	13.85	13.74
	Other Mechanics and Repairers (except Supervisors)	NY	141	10.59	11.58	12.63	12.39
565	Tile Setters (hard and soft)	CA	44	4.25	7.99	8.56	9.60
56A	Brickmasons and Stonemasons (including Apprentices)	MD	73	9.38	12.66	13.92	11.31
56B	Carpenters and Apprentices	CA	91	6.00	9.34	9.89	10.36
573	Drywall Installers	MD	34	9.83	11.64	11.79	10.93
59A	Construction Trades (N.E.C. Residual)	MD	121	8.49	8.83	10.06	10.41
	Construction Trades (N.E.C. Residual)	VA	221	7.01	8.59	9.15	9.22
63B	Machinists (including Apprentices)	CA	114	3.69	12.30	13.28	13.25
	Machinists (including Apprentices)	IL	32	11.71	13.15	14.09	13.71
68A	Other Precision Workers (assorted materials)	NY	38	9.69	10.91	13.22	12.78
71A	Metalworking and Plastic Working Machine Operators	CA	230	5.35	9.37	10.42	11.60
	Metalworking and Plastic Working Machine Operators	NJ	63	8.87	12.41	13.44	11.87
	Metalworking and Plastic Working Machine Operators	NY	54	8.66	10.53	11.64	11.59
72B	Metal and Plastic Processing Machine Operators	NJ	81	7.13	11.11	11.44	11.43
	Metal and Plastic Processing Machine Operators	NY	32	6.45	10.36	11.25	12.85
73A	Textile Apparel and Furnishings Machine Operators	MA	33	5.93	6.94	7.44	8.04

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	Textile Apparel and Furnishings Machine Operators	MD	269	5.13	6.50	6.59	6.98
	Textile Apparel and Furnishings Machine Operators	NJ	147	6.27	7.03	7.74	8.42
73B	Printing Machine Operators	NY	39	9.36	11.24	12.43	14.60
75A	Machine Operators (assorted materials)	MD	40	5.98	8.91	9.47	10.67
	Machine Operators (assorted materials)	NJ	99	7.24	9.44	10.62	11.42
	Machine Operators (assorted materials)	NY	98	6.58	9.34	10.51	10.96
	Machine Operators (assorted materials)	VA	61	6.15	8.81	9.36	10.55
78A	Fabricators Assemblers and Hand Working Occupations	NJ	209	6.63	9.27	9.73	10.87
	Fabricators Assemblers and Hand Working Occupations	NY	212	7.38	8.45	9.04	10.31
	Fabricators Assemblers and Hand Working Occupations	PA	110	4.85	9.34	10.30	10.31
	Fabricators Assemblers and Hand Working Occupations	VA	122	6.38	8.26	8.81	9.73
79A	Production Inspectors, Testers, Samplers, and Weighers	NY	44	6.91	11.02	11.57	12.17

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New York State alone, 7,687 applications involving positions in this group were certified in FYs 1988 to 1990. The average wage offered to these aliens was $.13 per hour below the 45th percentile and $.92 per hour below the mean for U.S. workers employed in this group in New York. The discrepancy for Virginia stood at $.70 and $1.21, respectively.

The DOL's Office of Inspector General is currently conducting an audit of labor certification filings in twelve states to determine the effectiveness of the permanent labor certification program. The DOL auditors are pulling labor certification applications at random from DOL and INS files. They then interview employers to determine the actual wage paid to the foreign worker and other information. The auditors' report is not yet completed. There is every reason to expect, however, that the findings of that report will lend further support to the analysis offered here.

NON-IMMIGRANT (OR NON-PERMANENT) VISA CATEGORIES

The INA contains 21 non-immigrant visa categories, many with several subcategories, that span the gamut from ambassadors ("A" visa) to religious workers ("R" visa)[51] (see box **2-10**). The purposes for which non-immigrants can enter the United States also range widely, from short-term tourists to long-term investors. Because of the hodgepodge of non-immigrant visa categories and purposes, no single principle currently defines the system. The only real "theme" is that stays must be temporary—although "temporary" is defined differently for each non-immigrant visa category and ranges from a few days to several years.

The underlying purpose of the non-immigrant visa system is to facilitate international political, cultural, and social exchanges, and trade and commerce; employment is permitted only in specific circumstances. In principle, non-immigrants should neither

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[51] In September 1994, Congress created an "S" visa category for foreign informants who have important information concerning individuals or organizations involved in criminal or terrorist activities, are willing to supply such information to appropriate law enforcement or judicial authorities, and whose presence in the United States is essential to the successful investigation or prosecution of the individuals or organization [see INA §101(15)(S)]. A "TN" category was created under the North American Free Trade Agreement Implementation Act to accommodate business professionals and their families [see INA §214(e)].

2-10. NON-IMMIGRANT VISA CATEGORIES UNDER CURRENT U.S. LAW

A	Ambassador, Public Official, or Diplomat and Family/Personal Employee
B	Temporary Visitor for Business or Pleasure
C	Person in Transit or Foreign Government Official and Family
D	Crewmember (Sea or Air)
E	Treaty Trader or Investor and Family
F	Student (Academic or Language Training) and Family
G	Representative of Foreign Government to International Organization or Official of International Organization and Family/Personal Employee
H	Temporary Worker or Trainee and Family
I	Representative of Foreign Information Media and Family
J	Exchange Visitor and Family
K	Fiancé/e or Child of Fiancé/e of U.S. Citizen
L	Intra-Company Transferee and Family
M	Vocational or other Non-Academic Student and Family
N	Spouse or Child of Certain Retired Employees of International Organizations
NATO	Official, Worker, or Certain Expert of NATO and Family/Personal Employee
O	Person of Extraordinary Ability in Sciences, Arts, Education, Athletics, or Business and Assistants and Family
P	Internationally Recognized Athlete/Artist and Family
Q	Participant in International Cultural Exchange Program
R	Person in Religious Occupation and Family
S	Informant (and Family) Possessing Information on Criminal Activity or Terrorism
TN	NAFTA Professional and Family

Source: Bureau of Consular Affairs, U.S. Department of State. *1994 Report of the Visa Office.* Washington D.C., 1995.

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reduce the job opportunities nor undermine the wages of U.S. workers. In cases where that principle "wobbles," statutory and regulatory practices have sought to construct a legal regime for the temporary employment of foreign workers which at least gives the appearance of protecting U.S. workers, although whether it actually does so is in some instances questionable and in others difficult to assess. Where a non-permanent visa category contains no explicit protections for U.S. workers, the resulting visas are *simply assumed* not to have features that displace or otherwise place foreign workers in unfair competition with U.S. workers. The overriding principle, which was confirmed by the changes in the H-1 category in the 1990 Act (see below), is that *foreign workers should not be able to compete with U.S. workers on the basis of the price for their labor.*[12] There should be a level playing field between U.S. and foreign workers on the wage issue.

Where employment is permitted in connection with non-immigrant visas, it should be clearly temporary. The underpinning rationale is that the temporary employment of foreign workers (when U.S. workers are unavailable due to skill and timing mismatches, etc.) benefits both the employer and U.S. workers in up- and downstream economic activities.

There are several broad types of non-immigrant visa categories through which foreigners may gain access to the U.S. labor market. First, through explicitly work-related temporary immigration (identified primarily with the D, H, O, and P visas). Second, through visas in which work is presumed to be incidental to the activity for which the visa was issued. Parts of the B-1 visa and certain components of the J-1 visa fall under this category. Finally, through categories where a work authorization is a benefit that derives from the principal beneficiary's status, such as with spouses and certain household personnel of certain diplomats.

In the following sections, we review each of the major work-related non-immigrant visa categories that include a direct or indirect work component (B-1 in lieu of H-1B, D, F-1, H-1A, H-1B, H-2A, H-2B, J-1, O, and P).

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[12] Protecting foreign workers from exploitative employment relationships was another of the goals of the 1990 Act.

B-1 IN LIEU OF H-1B VISA CATEGORY

A B-1 visa permits an employee of a foreign company to enter the United States for up to one year for business purposes. The INS records over two million such entries each year. Several hundred thousand more business people enter without B-1 visas for up to 90 days under the visa waiver pilot program. Because many admissions are by people who enter the United States more than once each year, the actual number of B-1 business people is much smaller than the number of admissions suggests.

Over time, case law and administrative interpretations have defined "business" to include attending conventions, conferences, consultations, meetings, and other legitimate activities of a commercial or professional nature. The term, however, does not include local employment or labor for hire.[53] For that reason, individuals in B-1 status cannot engage in "employment" in the United States and cannot receive a salary or remuneration from a U.S. source, although payment of incidental expenses is permitted.

INS and State Department regulations allow persons who are otherwise classifiable as H-1B non-immigrants (i.e., those with a "specialty occupation," as discussed in greater detail later in the chapter) to enter the United States in B-1 status if they do not have a contract or other prearrangement. This is informally called "B-1 in lieu of H-1B."

While use of the B-1 in lieu of H-1B is only a minuscule subset of overall B-1 usage, the practice has become controversial. It is claimed that some businesses are importing thousands of foreign workers (especially from India, Australia, Eastern Europe, the former Soviet Union, and the United Kingdom) through foreign subsidiaries or independent "body shops" under contract with U.S. personnel suppliers. These workers may work in the United States for long periods of time, often at substandard wages.

So far, the controversy has focused primarily on foreign computer programmers entering on B-1 in lieu of H-1B visas. The National Association of Computer Consultant Businesses (NACCB), a consortium representing 130 companies and about 10,000 U.S. computer consultants, is spearheading an assault on many fronts to curtail the B-1 in lieu of H-1B concept. The NACCB claims that foreign programmers are used to staff long-term consulting and software development projects for large U.S. employers. If the foreign programmers worked directly for U.S. employers, they would come in under the strict requirements of the H-1B visa category, which requires that H-1B workers be paid the higher of the prevailing wage for their occupation or the actual wage paid by the employer to other similarly qualified employees. However, by arranging for the foreign programmers to come in as B-1s, some companies are able to obtain programming services for much less than the prevailing wage for U.S. programmers. The NACCB charges that this is an evasion of the law that is costing its members jobs and profits.[54]

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[53] This requirement goes back to the B visa's early days and clearly reflects congressional intent that the visa should not be treated as a work visa (see Karnuth v. United States *ex rel.* Albro, 279 U.S. 231 [1929]).

In response to the controversy, the State Department and INS have each proposed regulations that would dramatically reduce use of the B-1 in lieu of H-1B category. The INS takes the position that, given the numerical restrictions and labor condition attestation requirements imposed on H-1B non-immigrants by the Immigration Act of 1990 (1990 Act), "B-1 in lieu of H-1" status is now inconsistent with Congressional intent to control the number of H-1B visas issued, as well as the intent to safeguard the working conditions of United States workers, and should be deleted."

The State Department favors maintaining the use of B-1 visas for certain employment-like activities but proposes various restrictions:

> The concept . . . of issuing visas in the B-1 classification to . . . aliens who are not employed by an organization in the United States but rather are working for and drawing their income from a foreign firm, is still perfectly valid under straightforward B-1 visa standards, regardless of the fact that the aliens may also be of "distinguished merit and ability." The issue thus becomes one of clarifying permissible B-1 activities in an age in which "business" has become global and business practices have significantly changed from those of the 1920s (DOS 1993:40024, 40025).

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[54] The actual impact of B-1 programmers on the computer industry is not clear. Estimates from several years ago that as many as 30,000 B-1 programmers are currently working in California, for example, seem high, but the INS and some experts reportedly feel that the estimate is reasonable (*San Francisco Chronicle* 1992:B1). Others dispute the number and doubt that B-1 workers really have a sizable impact on the U.S. economy (*Crain's Detroit Business News* 1992:21).

As discussed in more detail in Chapter 4, retaining an appropriately balanced B-1 concept is important because of the reciprocal nature of international trade. If the United States unduly restricts this category, other countries may retaliate and impose similar restrictions on U.S. workers seeking to enter and conduct similar activities in their countries. Our trade negotiations, both within the General Agreement on Trade in Services (GATS) and the North American Free Trade Agreement (NAFTA), have bound this use of the B-1.

For example, under the GATS, the United States is formally committed to allow services salespersons to enter the U.S. temporarily, as long as the following conditions are met: (a) they are not based in the United States; (b) they receive no remuneration from a source located in the United States; (c) they are negotiating for the sale of services; (d) such sales are not directly made to the general public; and (e) the salesperson is not engaged in supplying the service himself or herself (see U.S. Trade Representative 1994). These and related commitments restrict the United States' ability to impose limitations on the B-1 visa category without violating its international trade obligations under the GATS.

Under some circumstances, however, the proposed State Department rule might deny B-1 classification for people who enter the United States to negotiate contracts for service activities. If so, this would likely violate the U.S. commitment under GATS. By contrast, the INS's proposed rule, which was published several months after the State Department's proposal and which benefited from outside comments on the State Department's proposal, though broader, seems both less restrictive and better adapted to prevent abuses. The INS would require "ultimate control" by the foreign company over the foreign worker's employment, including hours and locations, but not day-to-day activities. Under the INS proposal, the foreign employer would have the right to interview and decide the acceptability of the foreign worker, as well as to control salary, promotion, etc. Moreover, title to the foreign worker's proprietary work product would have to reside with the individual or his or her foreign principal. The proposed INS regulation would thus not appear to preclude trade in services.

In the end, however, even the INS's proposed rule may be too restrictive in light of the continually changing nature of international trade. Our recommendations for reformulating the conditions for B-1 visas are included in Chapter 4. They are based largely on the factors laid down 30 years ago in Matter of Hira, 11 I. & N. Dec. 824 (BIA 1965, 1966, Attorney General 1966), which may remain the best test for determining when B-1 classification is appropriate.

D VISA CATEGORY

The D visa category is for foreign crewmembers of ships or airplanes. To qualify for a D non-immigrant visa, a crewmember must intend to land "temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft." In FY1994, the INS recorded nearly 2.1 million admissions in this category, many of which were undoubtedly by crewmembers who entered the United States more than once.

The 1990 Act amended the INA's definition of crewmembers in two ways. First, the 1990 Act denies crewmember status in certain labor disputes. Second, it prohibits foreign non-immigrant crewmembers from performing longshore work, with three exceptions: (a) safety and environmental reasons; (b) if the vessel is registered in a country that allows crewmen of U.S. registered ships to do longshore work (the reciprocity exception); or (c) if the "prevailing practice" allows foreign crewmen to perform longshore work.

The prevailing practice exception covers two categories. First, the exception applies if collective bargaining agreement or agreements cover at least 30 percent of the longshore workers, and each such agreement allows foreign crewmen to engage in longshore activities. Second, if there is no collective bargaining agreement, the ship owner or agent must file an *attestation* with the DOL at least 14 days before the date of performance showing that: (a) the activity is permitted at the local port; (b) there is no strike or lockout; (c) such action is not intended to influence the outcome of a labor election; and (d) notice of the attestation has been provided to the bargaining representative of longshore workers in the local port.

Each D attestation is good for one year. It covers all foreign crewmembers arriving in the United States during that time, as long as the ship owner or agent states in each crew list that he or she is continuing to comply with the attestation.

The D attestation process has a complaint and hearing procedure for filing challenges that is similar to the one established for

H-1B visas described below. There are some differences, however. For example, if the Labor Department ultimately determines that a foreign crewmember's activities are not permitted under the prevailing practice of a U.S. port, the ship owner or agent cannot file a subsequent attestation for activities in that port for one year. By contrast, if the Labor Department ultimately determines that an H-1B attestation failed to meet the statutory requirements or contained a material misrepresentation, the statute forbids that employer from filing any more H-1B and other non-immigrant and immigrant visa petitions for any foreign nationals "for at least 1 year" anywhere in the country, among other penalties.

The number of D crewmember attestations was quite small, even at the beginning, and has decreased over time. According to the DOL, 311 D attestations were filed in FY1992, 205 in FY1993, and only nine in FY1994.

E VISA CATEGORY

E visas are available on a reciprocal basis to nationals of states with which the United States has treaties of friendship, commerce, and navigation (FCNs) or bilateral investment treaties (BITs). Such foreign nationals may enter the United States either to carry out "substantial trade" between the United States and their country of nationality (E-1, or "treaty trader" visa), or to develop and direct the operations of an enterprise in which they have invested (or are actively in the process of investing) a "substantial amount of capital" (E-2, or "treaty investor" visa). The former visa category was codified in 1924; the latter in 1952. Some FCNs and BITs provide exclusively for E-1 visas, others for E-2 visas, and yet others for both types of visas.

Treaty traders are often self-employed. If they are employees, they must be employed in supervisory and executive duties essential to the enterprise. Their employer must also be a treaty trader and of the same nationality as the E-1 person. Under certain circumstances, a firm may gain treaty trader status for qualified technicians entering the United States to perform warranty repairs and similar tasks. In such cases, the employer must demonstrate that the job cannot be performed by a U.S. worker, and he or she must have plans and the capacity to train U.S. workers to replace the foreign technicians. There is no mechanism for enforcing this provision, however, beyond the visa-issuing consular official's "sense" of the company's sincerity and ability to comply.

Treaty investor status can be accorded to foreign nationals making the investment or to an employee who is working in a responsible capacity or who has "special skills" and is "essential" to the corporation's start-up. In either case, the employee must be of the same nationality as the investor.

Admitted initially for one year, treaty aliens can have their visas extended indefinitely in one-year increments. Nothing prevents them from shifting into other non-immigrant or permanent immigrant visa categories.

F-1 VISA CATEGORY

The F-1 non-immigrant visa category is reserved for foreign students who seek to enter the United States to study at an established college, university, or other academic institution. More than 452,000 foreign students are estimated to be studying at the post-secondary level in the United States, a number that has increased by nearly 30 percent over the last ten years (Davis 1995:2).

F-1 foreign students have a variety of work options. First, they can work on-campus as soon as they enroll, as long as they maintain their status as a full-time student and do not displace a U.S. worker. F-1 students may work on-campus 20 hours a week while school is in session and full-time when school is not in session.

Second, F-1 students can work off-campus if they can show economic hardship. INS regulations define this term as:

> hardship caused by unforeseen circumstances beyond the student's control. These circumstances may include loss of financial aid or on-campus employment without fault on the part of the student, substantial fluctuations in the value of currency or exchange rate, inordinate increases in tuition and/or living costs, unexpected changes in the financial condition of the student's source of support, medical bills, or other substantial and unexpected expenses.

One recent research report found that between 10 and 20 percent of foreign students at the universities surveyed are working under the economic-hardship exemption (Casals 1994:16).

Third, F-1 students who have been studying at least nine months may engage in either curricular or optional practical training. *Curricular* practical training is defined as "alternate work/study, internship, cooperative education, or any other type of required internship or practicum which is offered by sponsoring employers through cooperative agreements with the school." *Optional* practical training is not specifically defined, but it must be directly related to the student's major area of study. Optional practical training can take place during either or both the pre-completion or post-completion phases of a program of study; it cannot, however, exceed a total of 12 months combined in either phase.

Finally, since 1991, F-1 foreign students have been able to work part-time off-campus under a pilot program established by Congress under §221 of the 1990 Act after intense lobbying by the McDonald Corporation. Previously, only foreign students who could establish economic hardship could work off-campus in a field unrelated to their field of studies.

A business can participate in the §221 pilot program if it submits an attestation to the student's school and the Labor Department certifying that (a) it has recruited at least 60 days for the position; (b) it will pay the F-1 student and "other similarly situated workers" the higher of the actual wage rate for the occupation at the place of employment or the prevailing wage rate for the occupation in the area of employment; and (c) the student will not be employed more than 20 hours a week during the academic term. Students may work full-time during vacations and school breaks. If an employer's attestation is materially false or if the employer fails to pay the appropriate wages, he or she can be barred from further participation in the pilot program.

The new F-1 off-campus work program was scheduled to end on September 30, 1994. The legislation required the INS and DOL to submit a report to Congress on the program's impact and whether it should be extended.

The INS and DOL submitted their joint report in August 1994. The two agencies found that during the first two years of the pilot program (FY1992 and FY1993), just under 2,500 applications were accepted for filing,[55] covering fewer than 5,000 foreign students. An evaluation done for the two agencies concerning the pilot program found "no conclusive evidence of pervasive adverse effects" (DOL/INS 1994:4) during the first two years.

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[55] As in other attestation programs, the DOL is required to accept an F-1 attestation for filing as long as it is correctly filled out. The DOL does not review the merits of an F-1 attestation. According to the DOL, about one-half of all F-1 attestations are rejected for incompleteness.

Despite these findings, the two agencies opposed extending the pilot program. They were concerned that the attestation mechanism set up under the pilot program offered inadequate protection for U.S. workers:

> There is uncertainty about the efficacy of employer attestations as a reliable labor market test, particularly at the low end of the labor market, and in regions of the country or for occupations lacking the watchful eyes of labor unions or professional associations (Ibid.:5).

The two agencies concluded that the F-1 pilot program "run[s] counter to this Administration's commitment to an affirmative policy of U.S. labor force development" (Ibid.:8) and recommended against extending it. Congress was not convinced and extended the program in October 1994 for an additional two years (until September 30, 1996).

It is unclear how many F-1 students are working in the United States and what their impact on the U.S. labor market really is. A study done for the INS in 1991 by Price Waterhouse estimated that about 46 percent of the F-1 students it surveyed were working. Almost 9 percent of these worked off-campus, while about 39 percent worked on-campus.[56] About 61 percent of those employed were working 11 to 20 hours per school week (Price Waterhouse 1991).

The Price Waterhouse study concluded that off-campus employed students "have no significant impact on the U.S. labor markets."[57] A more recent study by Casals & Associates called the Price Waterhouse conclusion into question. The Casals report claimed that the Price Waterhouse report was flawed for several reasons. First, claimed Casals, the Price Waterhouse study:

> relied on analytical categories that are too broad to realistically assess the potential impact of F-1 student employment on

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[56] The apparent discrepancy is explained by the fact that some students held both on and off-campus jobs.

[57] Price Waterhouse derived this conclusion by analyzing F-1 students' labor force impact on four levels: national, state, industry, and occupation. On all four levels, the F-1 student labor force presence was too low (less than one percent) to have any significant impact. Moreover, because their wages and working conditions were similar to those of similarly employed U.S. workers, those factors were judged not to be significantly affected either.

> local labor markets. . . . A state unemployment rate, for example, could be low, yet a university town's local unemployment rate could be quite high . . . . A realistic labor market impact assessment would have to take into account local labor market conditions, especially the local labor markets in which F-1 students tend to be concentrated (Casals 1994: App. 3, p. 9).

Second, the Casals report criticized a key assumption of the Price Waterhouse study: that F-1 part-time employment could be converted into full-time employment equivalents. According to Casals, since almost all F-1 students work only part-time, "if labor market competition were to occur, it would pit F-1 students seeking part-time work against U.S. workers holding or looking for part-time employment, rather than U.S. workers holding or looking for full-time employment." Casals found that in all states except Michigan, the ratio of projected off-campus F-1 student workers would be equal to or exceed one-third of the number of U.S. workers looking for part-time employment.

Third, the Casals report noted that the 1990 unemployment rates used by Price Waterhouse were lower than the rates in 1991-93. That could invalidate some of the study's conclusions, argued Casals.

The Casals report also contained methodological weaknesses. For example, the report assumed that all F-1 students could receive work authorization for part-time employment. That is not the case. Both reports show that trying to assess the labor market impact of any type of foreign worker encounters significant methodological obstacles. These include both the level of aggregation used in looking for labor market effects and the domestic workforce population to whom the comparison is being made. Both reports also proceed from fundamentally static labor market assumptions and assume the full substitutability of foreign students with other U.S. workers. Finally, neither study was designed to truly address the underlying research and policy questions. As a result, neither report conclusively evaluates the impact of foreign students working in the United States.

H TEMPORARY WORKER VISA CATEGORY

The H non-immigrant visa category is the main temporary worker category in the INA. With some notable exceptions (primarily involving Mexican agricultural workers during the two World

Wars), the United States had prohibited the temporary employment of foreign workers since the 1880s. But that ban was lifted in the 1952 Act, which authorized the Attorney General to admit temporary workers to "alleviate labor shortages." In FY1994, almost 144,000 H non-immigrant workers (plus an additional 40,500 spouses and children) were admitted.

Over time, Congress has created more and more subdivisions to the H category. There are now four types of H workers: (a) H-1B, for foreign nationals working in "specialty occupations"; (b) H-2A, for temporary agricultural workers; (c) H-2B, for foreign nationals entering temporarily to fill other, non-agricultural positions; and (d) H-3, for certain trainees. Originally, both the H-1 and H-2 categories operated under an atypical "double temporary" test, in that *both* the job and the foreign national's stay in the United States had to be temporary. Congress repealed the H-1 requirement as it pertained to jobs in 1970, on the ground that "exceptionally skilled aliens" should not be ineligible for admission. The "double temporary" test remains for H-2A (farm laborers) and H-2B (non-agricultural) admissions, however. Since an employer cannot use these visa categories to fill a permanent need, they are used for seasonal employment or to fill short-term vacancies. Until September 1, 1995, there was also a fifth H subcategory: H-1A, for foreign registered nurses. It is discussed at the end of this chapter. Because of their small numbers, H-3 trainees are not discussed.

H-1B SUBCATEGORY

The 1990 Act dramatically changed the H-1B classification by eliminating the "distinguished merit and ability" formulation for this classification and replacing it with the concept of "specialty occupation." The INA defines specialty occupation as an occupation that requires both (a) theoretical and practical application of a body of highly specialized knowledge; and (b) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. In addition to giving nurses their own classification (see H-1A below), the 1990 Act carved out special non-immigrant visa categories (O and P) for extraordinary foreign nationals and artists, entertainers, and athletes. The Act imposed an annual cap of 65,000 on the number of people who can obtain H-1B status each fiscal year.

Most important, the 1990 Act imposed yet another form of attestation requirement, called a labor condition application (LCA), on H-1B petitioners. This type of attestation must be filed with and accepted by the DOL before an H-1B petition can be filed with the INS.

An employer must attest to four conditions in the LCA. First, the employer must offer the *higher of* either (a) the "actual wage" the employer pays to other individuals similarly employed with similar qualifications or (b) the "prevailing wage" for that position, based on "the best information available." Second, the employer must affirm that the working conditions for the H-1B worker will not adversely affect the working conditions of other workers similarly employed. Third, the employer must attest that there is no strike or lockout at the place of employment. Fourth, the employer must attest that it has given its employees notice of the filing of the attestation, either by posting the attestation at the worksite or by giving notice to the union representative, if there is one. The LCA must also contain additional details, such as the wage rate offered.

The LCA form is filed with the regional DOL office where the H-1B worker will be employed. Unlike the permanent labor certification process, but like the attestation mechanisms we have been and will be examining in this chapter, the DOL has no authority to scrutinize the merits of the LCA form. Rather, it merely makes sure that the form has been filled out completely. Once the DOL approves the LCA, it is valid for three years. The employer must retain and make available for public inspection within one day after the LCA is filed all documentation supporting the LCA.[58]

In FY1992, 53,485 H-1B LCAs were filed. Of that total, the DOL accepted 43,808. The number of H-1B LCA filings increased 36 percent in FY1993, to 72,850, of which DOL regional offices accepted 62,285 and denied 10,270 for incompleteness. The overall acceptance rate was 86 percent that year, four percent higher than in FY1992. In FY1994, the DOL received 97,166 H-1B

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[58] The required documentation includes (a) a copy of the completed LCA; (b) documentation specifying the wage rate to be paid the H-1B non-immigrant; (c) a full, clear explanation of the system that the employer used to set the "actual wage" paid in the position (e.g., memorandum to the file summarizing the system or a copy of the employer's pay system); (d) a copy of the documentation used to establish the prevailing wage; and (e) a copy of the notice given to the union or employees.

LCA filings, an increase of 25 percent over FY1993. Of that total, 84,898 were accepted and 12,006 were rejected for incompleteness, for an overall acceptance rate of 88 percent.

Once the LCA is accepted, an H-1B petition can be filed for each worker covered by the attestation. The INS approved 57,125 petitions for H-1B specialty occupation workers in FY1992, 61,591 in FY1993, 60,179 in FY1994, and 54,718 in FY1995. The FY1995 figure represents a slight reduction in approvals over the same time period in FY1994.

Until recently, an employer could file an H-1B LCA even though he or she had no immediate intention of petitioning for a foreign worker. Some employers undoubtedly did this so that they could file an application with the INS quickly if it looked like the 65,000 cap on H-1B admissions might be reached before the end of the fiscal year. Other employers filed "blanket" LCAs on behalf of more than one employee or for potential future employees, so that they would have to go through the LCA process only once. A new DOL rule curbs the ability to file such blanket LCAs.

Failure to comply with the H-1B LCA requirements may result in a fine of $1,000 per violation for the employers and a debarment from all future immigrant and H, L, O, and P non-immigrant visa approvals for at least one year. If the employer has not paid the appropriate wage, it may also be ordered to pay back wages.

In response to business concerns that the DOL might be tempted to overreach and start its own investigations, Congress stipulated that enforcement of H-1B LCAs be complaint-driven. As of August 31, 1995, the DOL had received 141 complaints alleging violations. Of that total, over half were received in the last two years—clearly a function of the negative publicity that has surrounded the program. The DOL had started 91 enforcement proceedings and completed 59, under which it collected more than $1.6 million in back wages and over $215,000 in fines.

Most of the H-1B LCA enforcement actions have been brought against computer companies and physical therapy placement firms.[19] Most of these have involved relatively few foreign workers and small amounts of fines or back wages. A few big cases have received a great deal of attention, however. For example, in 1993, the DOL cited Complete Business Solutions, Inc. (CBSI), a Michigan-based computer consulting business, for 320 violations of the H-1B LCA regulations, based on employees the company had placed at various worksites in northern California. The DOL claimed that CBSI owed $180,000 in penalties and an undetermined amount in back wages to its H-1B employees. In January 1994, CBSI agreed to pay $45,000 in penalties. The company also agreed not to participate in the H-1B program for five months, and to include in all LCAs the applicant's job classification and intended work site.[60]

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[19] The DOL's Office of Inspector General is currently conducting an audit of H-1B LCA filings in twelve states to determine the effectiveness of the H-1B program. The auditors are pulling LCAs at random from DOL and INS files. They then interview employers to determine the actual wage paid to the H-1B worker. The auditors' report is not yet completed.

Also in 1993, the DOL found that Digital Equipment Corporation (DEC) submitted LCAs that failed to accurately specify the wage rate to be paid non-immigrant programmer analysts. The company had filed "blanket" LCAs that said that 50 H-1B programmer analysts would be paid between $30,500 and $40,000 a year to work at any of several DEC sites in Massachusetts. The DOL also claimed that DEC failed to: (a) develop appropriate documentation to establish the actual wage for the occupation in question; (b) include in its public access file a "full and clear" description of the system used to set the actual wage; and (c) provide a general description of the source and methodology used to determine the prevailing wage for the occupation. The DOL claimed that DEC owed a fine of $37,500, plus back wages of $85,035, to 42 H-1B programmer analysts. DEC settled the case in January 1994 by agreeing to pay $19,000 in fines and $26,360 in back wages to 24 employees. DEC also agreed to adjust salaries to the required wage, and to document in a public access file the system used to establish each H-1B worker's salary. In addition, DEC agreed not to participate in the H-1B program for three months.

In August 1995, Syntel, Inc., a computer services firm headquartered in Michigan, agreed in a settlement with the DOL to invest $1 million to give its U.S. employees advanced computer training. Syntel supplies computer programmers and analysts to customer firms throughout the United States. A DOL investigation of alleged

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[60] CBSI also agreed to post notices informing its employees that they may review the LCAs and to increase the number of U.S. workers for its 1994 training program by 25 more than the number who participated in the company's 1993 training program.

H-1B violations disclosed $77,700 in back wages owed to 40 employees. The DOL also assessed Syntel a $30,000 fine for failing to pay its foreign workers properly. In addition to the $1 million in worker training, Syntel agreed to: (a) increase by 10 percent the proportion of its U.S. computer workers where foreign workers are currently employed; (b) target recruitment toward U.S. workers in every local job market in which Syntel employs 25 or more foreign workers before assigning any additional H-1B workers to that job market; (c) make a good faith effort to determine whether any workers of a customer firm had been or will be displaced by Syntel employees, and, if so, to interview and offer employment to qualified displaced workers; and (d) not to hire any new foreign workers for 90 days.

Finally, the DOL claimed in 1994 that Rehab One, a physical therapist placement company based in Dallas, Texas, owed $85,500 in fines and an undetermined amount in back wages to over 50 H-1B employees.[61] The DOL also disallowed Rehab One's effort to include certain non-wage allowances to its workers as part of the wage calculation, including relocation and insurance fees and housing and transportation allowances. Rehab One settled the case in August 1994 by agreeing to pay a fine of $23,000 and back wages of $465,000. The company also agreed not to file any more H-1B petitions or to use H-1B workers.

Although these examples of H-1B enforcement actions are not representative of the typical H-1B employer or of H-1B violations, they do point up some of the problems in the current H-1B system. These include loose job classifications; job classifications that do not correspond easily to DOT classifications, making it hard to determine the correct prevailing wage; severe weaknesses in prevailing wage surveys and methodologies; and multi-site work arrangements that make it difficult to hold contractors liable for compliance with the regulations.

In an effort to tighten enforcement of its H-1B regulations and to curb alleged abuses, the DOL revised its H-1B LCA rules in December 1994. Among other things, the new rule defines additional LCA terms, asserts that the DOL has authority to investigate alleged LCA violations without waiting for a complaint to be filed, establishes new requirements for job contractors, and clarifies certain wage issues. Employers have decried the new rule, claiming that it is too burdensome, contradicts Congress' intent when it enacted the H-1B LCA process, and exceeds the DOL's authority under the statute, particularly on whether it has the authority to initiate investigations. A lawsuit challenging the legality of the new rule is pending in federal court.

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[61] A Minneapolis newspaper reported that the Polish physical therapists working for Rehab One were paid far less than the $30,000 to $35,000 annual salary stated on the company's LCAs. According to the article, some of the physical therapists were paid only $500 a month plus a food allowance and use of an apartment and rental car while they studied to obtain their U.S. physical therapy licenses (*Minneapolis Star Tribune* 1993:13).

H-2A SUBCATEGORY

The H-2A provision of the INA allows foreign farm laborers to work in the United States at temporary jobs for a period of one year, renewable for one-year increments to a total of three years. To bring in foreign workers under the H-2A program, a grower must prove that (a) "there are not sufficient [U.S.] workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the [agricultural] labor or services involved in the petition"; and (b) there will be no adverse effect "on the wages and working conditions of workers in the United States similarly employed." In general, whatever wages, benefits, and working conditions the employer intends to offer H-2A workers must also be offered to U.S. workers.[62] Some of the key controversies in the H-2A program revolve around what those requirements really entail.

Few agricultural workers receive salaries for their work; most are paid on an hourly or piece-rate basis. Wages offered to H-2A workers must be equal to those offered U.S. workers. This has been interpreted to mean the highest of: (a) the industry's prevailing wage in the relevant labor market; (b) the state or federal minimum wage; or (c) an adverse effect wage rate (AEWR). The purpose of an AEWR is to offset the depressing effect on wages created by foreign farm workers, who dominate certain labor markets; it is in effect an enhanced minimum wage. The AEWR applies in most H-2A cases.

The United States has used AEWRs in the temporary agricultural worker area since 1953. The system has many of the attributes of a social policy, in that the government is artificially inflating market and wage rates for a cohort of workers that is among the most disadvantaged in the United States. Thus, the government in effect acknowledges that its intervention of allowing admission of foreign workers requires the second intervention of inflating wages through the AEWR mechanism. By regulating the wages of H-2A workers and then compelling growers to pay all workers the higher AEWR rate, the government effectively creates a separate "flat" wage (in the sense that it is both a floor and a ceiling) for *all* agricultural workers in a state's perishable goods industry.

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[62] Such benefits include free room and board. The vast majority of Western growers do not use the H-2A program because of this requirement, preferring to rely on undocumented foreign workers, mostly from Mexico. Thus, the H-2A program has been primarily an East Coast phenomenon.

A grower wishing to use an H-2A worker must first file an application with the DOL, which will tell the employer and the state employment service what recruitment efforts are necessary. There are three types of H-2A recruitment: state employment service referrals to the employer; positive recruitment by the employer; and post-certification recruitment. Most potential U.S. applicants come from referrals through the inter-state employment service system. Growers must also make positive recruitment efforts "within a multi-state region of traditional or expected labor supply" if the DOL determines that a "significant" number of qualified U.S. workers can be found there. Recruitment of domestic workers must continue even after H-2A certification has been granted. The state employment service will continue to refer U.S. workers to the employer until 50 percent of the work contract with the H-2A workers has been completed.

The DOL may deny temporary labor certification if it determines that the job order has been filled by domestic workers or that H-2A workers have been offered better working conditions than U.S. workers.[63] If it grants certification for some or all of the H-2A workers requested, the employer then files a visa petition with the INS Regional Service Center responsible for the area where the foreign farm workers will be employed. If the INS approves the visa petition, it forwards notice of the approval to the U.S. consulate where the workers will apply for their H-2A visas. If the INS denies the petition, the employer can appeal in an accelerated procedure.

The DOL reports that it certified jobs for 18,939 foreign farm workers in the H-2A program in FY1992, 17,000 in FY1993, and about 17,000 in FY1994. The INS actually admitted only 16,385 H-2A temporary agricultural workers in FY1992, 16,257 in

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[63] Some growers prefer H-2A workers over domestic workers for a variety of reasons: the foreign workers' attitude toward work; the growers' power "advantage" over the foreign workers; and the lower costs in benefits paid the foreign workers.

FY1993, and an estimated 10,650 in FY1994. The lower INS figures reflect the fact that not all growers file H-2A petitions with the INS after they receive certification approval from the DOL and that the same foreign worker may hold more than one DOL-certified job during the course of the year.

These numbers show a continuing downward trend.[64] In FY1988, for example, over 100,000 foreign farm workers came to work temporarily in the United States. In a larger historical context, even that number of temporary foreign farm workers is small compared with annual admissions under the *bracero* program of the 1950s, which peaked at 459,850 in 1956. Over 4.4 million foreign farm workers, almost all of them Mexicans, entered the United States to work temporarily in U.S. agriculture between 1951 and 1964, when the *bracero* program ended.

H-2B SUBCATEGORY

The H-2B classification allows the *temporary* entry of foreign workers who will be performing *temporary* non-agricultural services or labor. An H-2B petitioner must show that there are no U.S. workers available to do the job. As with the H-2A program, "temporary" for H-2B purposes means that the need for the service must be for a year or less, absent extraordinary circumstances—a requirement that effectively limits the number of petitions filed under this classification.[65] Moreover, the need must be a one-time occurrence, or a seasonal, peak load or intermittent need, not an ongoing need. Consequently, few people enter the United States in H-2B status each year.

H-2B petitions are granted for many seasonal and short-duration activities, as well as home attendants or practical nurses for the terminally ill, camp counselors, or engineers needed for a peak production phase. According to the DOL, 24 percent of all H-2B labor certification applications decided in FY1991-1993 were for workers in the fishing industry, 17 percent were for musicians, and 15 percent were for household employees.

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[64] The trend is partly attributable to increased enforcement vigilance by the DOL's Wage and Hour Division (WHA), which since 1986 has had enforcement responsibilities for the "terms and conditions" components of H-2A contracts. The WHA's increased vigilance was caused in part by intense legal and political pressure by farm worker activists. Such enforcement has increased automation in some sectors of the agricultural industry that typically relied on H-2A workers, notably the sugar cane industry, decreasing demand for H-2A workers (see *New York Times* 1991:D1).

[65] An H-2B petition can be approved for a maximum of one year. Two one-year extensions are theoretically possible, but are rarely granted. Any extension request must be accompanied by a new temporary labor certification or DOL notice that certification cannot be recommended.

In FY1991, the DOL received 2,823 H-2B temporary labor certification applications and approved 1,742. In FY1992, 2,113 applications were filed, of which 1,540 were approved. In FY1993 and FY1994, the DOL received 2,225 and 2,234 applications, respectively, and approved 1,614 and 1,730. Many H-2B labor certification applications are filed on behalf of more than one worker. Thus, according to the DOL, the total number of H-2B workers applied for was 10,520 in FY1991, 12,165 in FY1992, 9,205 in FY1993 and 8,830 in FY1994.

The INS admitted 21,442 H-2B workers in FY1991, 18,052 in FY1992, 14,847 in FY1993, and 15,687 in FY1995. These numbers differ markedly from the number of workers listed on H-2B labor certification applications filed with the DOL. The discrepancy is because temporary foreign workers may enter the United States more than once each year. In any event, these numbers are far below the annual ceiling of 66,000 H-2B visas that Congress established in 1990.

The H-2B labor certification process is similar to the permanent labor certification process, except that it is on a faster track.[66] Once the DOL grants the temporary labor certification, or notifies the employer that it will not certify the application, the employer files a petition with the INS. *Because the DOL's role in the H-2B process is only advisory, the INS can grant an H-2B petition even if the DOL recommends against certification.* Unlike the H-2A program, the DOL has no specific enforcement responsibilities over the terms and working conditions of H-2B workers.

A February 1994 report on the H-2B program prepared for the West Virginia Bureau of Employment Programs found no widespread abuses of foreign workers, although there were many instances of casual record-keeping that raised questions about compliance with wage requirements and deductions. The report also found a systematic preference for non-immigrant workers in some industries or localities that worked in subtle ways to the detriment of U.S. workers. The report found that certain local occupations, such as stone quarry work in Idaho, are completely dominated by H-2B workers. In other instances, such as crab-picking in North Carolina, the proportion of H-2B workers has increased significantly. In other cases yet, such as hotel/resort workers, H-2B workers play an important role in some local areas, but remain basically supplemental to the domestic workforce (Griffith *et al.* 1994).

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[66] A prospective H-2B employer files a form with the relevant state employment service office. The same basic recruiting, posting, and advertising procedures as for permanent labor certification are carried out. The DOL generally decides H-2B temporary labor certification applications within a few months.

The H-2B program has generated its share of controversy and litigation. For example, domestic agricultural workers in Texas have sued the DOL, claiming that they were denied the opportunity to perform forestry work in east Texas and Arkansas. The plaintiffs contend that the DOL's H-2A regulations also apply to H-2B workers, and that by not following those procedures the DOL is depriving U.S. workers of employment and/or is adversely affecting their wages and working conditions. The case is still pending.

In another case, six H-2B workers from Mexico were recruited to work as crab-pickers in North Carolina. The plaintiffs claimed that the defendants violated the Fair Labor Standards Act (FLSA) by paying them less than the minimum wage and failing to pay them for overtime. The parties settled the case. Several other cases filed by H-2B workers in the seafood industry in North Carolina are pending, mostly involving allegations of FLSA violations.

In perhaps the most publicized H-2B controversy, the Justice Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) filed a civil suit in 1990 charging the McDonnell Douglas Corporation with *citizenship status discrimination* under the Immigration Reform and Control Act of 1986 (IRCA).[67] The OSC claimed that to obtain temporary non-immigrant workers, McDonnell Douglas misused the H-2B labor certification process by representing that it was unable to obtain qualified U.S. workers, when in fact such workers were available.

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[67] To counteract fears that employer sanctions might increase discrimination against foreign-looking and -sounding persons, in 1986 Congress created OSC within the Department of Justice to investigate unfair immigration-related employment charges. The office normally prosecutes employers who fire or fail to hire a foreign national in violation of IRCA's anti-discrimination provisions. The OSC's suit against McDonnell Douglas was the first one brought in a non-immigrant visa context and the first one brought on behalf of U.S. workers rather than foreign nationals.

The Office alleged that McDonnell Douglas engaged in a pattern or practice of employment discrimination in hiring jig and fixture builders for its contract with the Air Force to build C-17 aircraft. The OSC also claimed that qualified U.S. applicants were rejected by McDonnell Douglas while it obtained temporary labor certification and H-2B visas for jig and fixture workers from the United Kingdom. The original complaint named 20 injured parties, later amended to 22, who had filed charges with the OSC. McDonnell Douglas subsequently settled the OSC's case, agreeing to pay up to $20,000 in back pay and $10,000 in civil penalties.

J VISA CATEGORY

Congress created the J visa category in 1961 for temporary entry into the United States for the "purpose of teaching, research, consulting, demonstrating special skills, or receiving training." It was initially intended primarily for university and cultural exchange and visitor programs. The visa category is administered by the U.S. Information Agency (USIA).

J visa applicants must show that they meet the exchange program's qualification criteria, have adequate means of support (usually in the form of a full subsidy by the sponsoring institution), and intend to return to their home country upon the program's completion.

There are no regulatory limits on the length of the initial visa (the length of the program determines the visa duration), and extensions are possible. In many cases, J visa holders must return to their home countries for a minimum of two years before they can apply for U.S. permanent residence.

The J visa program is administered entirely by private-sector organizations authorized by USIA to issue the appropriate documents. The consular official's role is purely perfunctory. The program has grown from about 50,000 in the early 1980s to nearly 200,000 at present. One of the J visa program's largest components—training programs—is of particular concern to the DOL, as is the much smaller *au pair* program. In a recent audit of the J visa program, the U.S. General Accounting Office (GAO) concluded that certain activities and programs in the trainee and international visitor categories, including the summer student/travel work, international camp counselor, and programs *au pair* are inconsistent with legislative intent, "...dilutes the integrity of the J visa," and "obscure the distinction between the J visa and other visas" granted for work purposes (GAO 1990:22). The DOL is also on record since 1988 as "concerned" about the *au pair* program's "work component," because it fails to test for adverse effects on U.S. workers and leads to average work weeks for *au pairs* of 45 hours at "compensation" of $100 plus room, board, and an occasional college course.

O AND P VISA CATEGORIES

Until 1991, "extraordinary" foreign nationals and artists, entertainers, and athletes could enter the United States temporarily under the H-1 non-immigrant visa category. As part of its immigration overhaul in 1990 (that came into force on October 1, 1991), Congress gave them their own non-immigrant visa categories (O and P). Generally, O-1 classification is available to foreign nationals of "extraordinary ability" in the sciences, arts, education, business, or athletics or of "extraordinary achievement" for those in motion picture or television productions. O-2 classification may be granted to individuals entering the United States solely to accompany and assist an O-1 alien in an artistic or athletic performance.

P-1 classification is available to athletes performing at an "internationally recognized level of performance," either individually or as part of a group or team, and to entertainers and essential support personnel performing as part of a group that has been "recognized internationally" as being "outstanding" for a sustained period of time. P-2 classification is available to artists, entertainers, and entertainment groups seeking to enter the United States to perform under a reciprocal exchange program. P-3 classification is for artists, entertainers, and entertainment groups who perform, teach, or coach under a program that is culturally unique, as well as for their essential support personnel.

Petitions for O or P classification must normally include an advisory opinion from worker organizations. Petitions involving motion picture or television productions must also include a consultation with a management organization in the area of the foreign national's ability. An advisory opinion generally discusses the nature of the work to be done and the foreign national's qualifications. Alternatively, the worker organization may simply say that it has no objection to the petition being approved. The INS developed its O and P regulations to implement the advisory opinion requirement in tandem with unions and employers.

The purpose of the O and P consultation requirement is to institutionalize the process of obtaining views from potentially affected worker organizations. The advisory opinions are not binding on the INS. There is no explicit enforcement mechanism, but the mere fact of requiring prior consultation with a worker organization is thought to act as somewhat of a safeguard for U.S. worker interests. Thus, the O and P consultation process provides an alternative model for regulating the influx of foreign workers.

Q VISA CATEGORY

The 1990 Act established a new Q non-immigrant visa category for certain participants in "cultural exchange programs" designated by the INS. The programs must provide practical training, employment, and "the sharing of the history, culture, and traditions" of the individual's homeland. The individual must receive the same wages and working conditions as U.S. workers and can stay in the United States for up to 15 months. Q non-immigrants must also have a foreign residence that they have no intention of abandoning.

Unlike some of the other visa categories described above, the Q visa category has no mechanism to protect U.S. workers. Nevertheless, relatively few people have entered as Q non-immigrants. The INS admitted 1,006 Q cultural exchange participants to the United States in FY1993 and 1,547 in FY1994.

H-1A SUBCATEGORY (NOW LAPSED)

In response to a widely acknowledged shortage of registered nurses in the United States at the time, Congress enacted the Immigration Nursing Relief Act of 1989 (INRA). The Act split off foreign registered nurses (RNs) from other H-1 temporary workers (see discussion above) and put them in their own H-1A category for a five-year period that ended September 1, 1995. H-1A visas permitted stays of up to five years.

Section 2 of INRA also allowed some foreign RNs who were already in the United States to adjust to permanent resident status. For new H-1A admissions, however, Congress established stricter procedures out of concern that health care facilities were becoming too dependent on foreign nurses. Thus, Section 3 of INRA required health care facilities to attest to six criteria (see box **2-11**,

p. 96) before they could hire an H-1A foreign RN. All in all, the H-1A procedures were considerably stricter than those discussed in the D, E, and H-1B categories.

The DOL received 1,947 H-1A attestations in FY1991 and accepted 1,095 of them. In FY1992, 1,745 attestations were filed and 1,088 were accepted. The equivalent numbers for FY1993 were 1,884 and 1,199, and 2,261 and 1,424 for FY1994. Regional DOL staff estimate that in FY1995, 2,200 H-1A attestations were filed and 1,650 were accepted.[68]

As with other attestation, and unlike labor certification applications, the DOL could not review the merits of H-1A attestations. Instead, INRA restricted the DOL role to simply checking that the attestation form was properly completed and that the required explanatory statements were provided. Post-visa investigating powers were given to the Wage and Hour Division (WHA) of the DOL's Employment Standards Administration, which was authorized to investigate allegations that a health care facility failed to meet the conditions attested to or that a facility misrepresented a material fact in an attestation. If violations were found, the DOL could impose administrative remedies, including civil money penalties and back wages. Violators were also prohibited from having H-1A petitions approved for at least one year.

During the life of the program, the WHA completed 13 investigations of alleged H-1A attestation violations. Five others were under way at the program's conclusion. The WHA assessed facilities over $770,000 in back wages due foreign RNs, and $148,250 in civil penalties. The most frequent H-1A enforcement issues involved violations of the second attestation element (that the employment of foreign RNs should have no adverse effect on the wages and working conditions of U.S. nurses) and the fourth (requiring facilities to take "timely and significant steps" to recruit and retain U.S. nurses).

Congress set up the H-1A classification as a five-year experiment. To help it decide whether the INRA experiment worked, Congress authorized the DOL to set up an advisory group that included representatives of the federal government, hospitals,

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[68] It should be noted that part of the increase in FY1994 is due to the fact that, during the year, the DOL changed its reporting procedures so that regional DOL offices, rather than the national DOL headquarters, collected data on H-1A attestations. DOL officials acknowledge that during the transition some double-counting may have occurred.

2-11. H-1A ATTESTATION CRITERIA

An employer had to attest to six criteria in the H-1A program:

1) The employer had to show that there would be a "substantial disruption" of its delivery of health services without the employment of a nonimmigrant nurse. A facility had to show that it had not laid off any nurses during the 12-month period before submitting the attestation. The facility also had to show a nursing shortage, primarily by demonstrating: (a) a seven percent nurse vacancy rate; (b) an inability to use seven percent or more of its beds because of a lack of nurses; (c) the elimination of essential services because of a lack of nurses; or (d) an inability to implement plans for new services because of a lack of nurses. Alternatively, a facility that was unable to show any of these could show "other substantial disruptions" due to a shortage of nurses.
2) The employer had to show that employing a foreign nurse would not affect the wages and working conditions of U.S. nurses. This meant that the facility had to pay the higher of either the prevailing wage for the occupation in the geographic area or the wage rate paid other nurses at the same facility. State employment agencies determined the prevailing wage.
3) The facility had to show that it would pay foreign nurses the same wage rate as other similarly employed nurses at the facility.
4) The facility had to show that it was either taking "significant steps" to recruit and retain U.S. nurses, or was subject to an approved state plan to recruit and keep such nurses. The statute listed five examples of such significant steps: (a) operating a training program for nurses at the facility or financing a

labor organizations, and immigration attorneys. The group was mandated to advise the Secretary of Labor on: (a) the impact of INRA on the nursing shortage; (b) programs that health care facilities implemented to recruit and retain U.S. nurses; (c) state recruitment and retention plans; and (d) the advisability of extending the law beyond FY1995.

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training program elsewhere; (b) providing career development programs and other methods to encourage health care workers to become nurses; (c) paying higher wages than those paid to other nurses employed in the same area; (d) providing adequate support services to free nurses from administrative and other non-nursing duties; or (e) providing reasonable opportunities for meaningful salary advancement. An employer had to normally take at least two "significant steps," unless it could show that taking a second step would be unreasonable.

5) The employer had to show that there was no strike or lockout at the facility and had to notify the DOL within three days if a strike or lockout occured at the facility at any time.
6) The employer had to notify the relevant nurse's bargaining representative when an H-1A attestation was filed. If there was no bargaining representative, the employer had to post a notice at the facility where the foreign nurse was to be employed.

Along with the attestation, the employer had to submit a brief explanation of what documentation was available at the facility for each attestation element, and how it was complying with the regulations for that element. The full documentation had to be retained at the health care facility for the duration of the attestation period, and for as long thereafter as the facility continued to employ an H-1A nurse hired under the attestation. Also, the facility had to attest that the documentation was available for public examination within 72 hours of receiving a request.

The advisory panel issued its report to the Secretary of Labor in March 1995. The group found that an estimated 13,000 H-1A nurses worked in the United States, accounting for between 0.5 and 1.5 percent of RNs in this country. This number has not decreased in the last five years. Just five large metropolitan areas (New York City–Newark, Chicago, Houston, Los Angeles, and

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Miami) accounted for two-thirds of all H-1A petitions filed, and three types of facilities filed about 90 percent of all H-1A attestations: acute care facilities (62 percent); long-term care facilities (22 percent); and nursing contractors (6 percent) (Immigration Nursing Relief Advisory Committee 1995:4-5, 23-24).

The advisory group found that, while the nursing shortage of the late 1980s had abated, INRA "had at most only a small impact" in that process.[69] Larger market adjustments, such as increasing wages, a slackening in hospital demand for nurses, the restructuring of the health care industry, and increasing numbers of nursing graduates (over 307,000 new U.S. nurses graduated between 1990 and 1993) were more important reasons for ending the shortage, according to the panel.

Although the advisory group found that as implemented, INRA did not afford much protection to U.S. workers, it was unclear whether much protection was needed in the first place. For example, the report found no evidence that hospitals paid H-1A nurses any less than other nurses they employed. There was also no evidence of systematic differences in work assignments given to H-1A nurses as compared with U.S. nurses.

Some employers found INRA's attestation process to be "bureaucratic, burdensome, and useless." Others found the process "more or less benign." Most used legal counsel to help file the attestations. One recurring problem concerned prevailing wages. According to the panel, "[t]he complexity of the nurse wage structure and the frequency with which it changes make it virtually impossible for state employment security agencies to obtain complete and comparable data on prevailing wages and to keep the data current" (Ibid.: 28-29).

The panel found the future labor market for registered nurses to be "highly uncertain." Unemployment among nurses is edging to 2 percent for the first time in a long time. Many new graduates report trouble finding jobs. However, said the panel, "[t]he flat employment figures for hospitals overall and for nurses in hospitals may represent a 'pause,' as seen in the early 1980s, with rapid growth resuming soon" (Ibid.: 31). The aging of the U.S. population makes that projection highly credible. The majority of the advisory panel members, therefore, recommended extending INRA. Three members of the panel, all organized labor officials, dissented. The dissenters argued that the nursing shortage of the 1980s was a transitory phenomenon, and that a slight oversupply of nurses now exists. They found no justification for extending the INRA experiment. By failing to enact legislation to extend the statute, Congress agreed.

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[69] Although the research conducted for the DOL found little evidence of INRA's effect on the nursing shortage, it may be that it was simply too difficult to isolate INRA's impact from all the other variables.

There are a number of things we can learn from the H-1A experiment. First, SESAs do not have the tools to calculate prevailing wages very well. For example, SESAs have been willing to set only one or two salary differentials per occupation; this has no relationship to how most labor markets operate. Nor can DOL enforcement personnel make the fine judgments necessary to ascertain from among the many gradations of pay whether an abuse has taken place. All this suggests that the federal government should get out of the business of calculating prevailing wages, a point that we will take up again in subsequent chapters.

Second, the intrusiveness of the H-1A process did not appear to make any measurable difference in the end. In fact, hospitals did not end up recruiting more U.S. nurses despite the requirement that they take "timely and significant" steps to do so. Thus, government intrusiveness does not necessarily improve opportunities for U.S. workers, while it vastly (and unnecessarily) increases costs to business.

Third, labor contractors, who offer staffing flexibility to employers by taking charge of recruiting and importing workers, create special problems for the visa system. The INRA advisory panel recommended that nursing contractors/registries/agencies should no longer be eligible to participate in the H-1A program. While we cannot go that far without examining the factual basis for this recommendation, *we firmly believe that the INS and DOL should strive to understand and regulate these elements of the flexible staffing industry much more closely in all visa categories.*

3. ALTERNATIVE MODELS OF ECONOMIC-STREAM SELECTION: A CRITIQUE

There are several ways a country can choose which foreign workers it is willing to admit. Although all systems seek to serve the national interest, some systems emphasize the protection of domestic workers, others the identification and rectification of labor market shortages, and still others the long-term economic health of a society. This chapter summarizes and critiques four selection models, as they are used in various countries: (a) U.S. individual worker labor market tests; (b) European systems of labor market tests; (c) generalized labor market information; and (d) point systems as practiced in Canada and Australia. Each of these four methods is anchored in a specific political and public policy tradition, as well as in a distinct set of attitudes about immigrants in general and foreign workers in particular. As a result, extreme care must be taken to ensure that any attempts at comparative "learning" will take into account the underlying reasons for the variations (see Papademetriou and Hamilton 1995).

THE U.S. INDIVIDUAL WORKER LABOR MARKET TESTS

The United States uses a variety of systems for determining which foreign workers may be admitted and under what circumstances. Some of these systems focus on *pre-entry* controls. Labor certification and, to a much lesser degree, consultations with worker organizations (such as those in force for the O and P visa categories discussed in Chapter 2) are examples of such systems. Others allow relatively easy access to the U.S. labor market and expend most regulatory and enforcement energy on *post-entry* controls, which focus on the terms and conditions of the foreign worker's employment. In various forms, the attestation mechanism is the principal example of this type of control. In this section, we will evaluate the two main systems: certification and attestation.

PRE-ENTRY CONTROLS: LABOR CERTIFICATION

One way to select foreign workers is to test individual applicants against a particular job opening at a particular place and point in time. As discussed in Chapter 2, the United States uses this model in its permanent and H-2A and H-2B temporary labor certification systems, on the assumption that this is the best way to make sure that foreign workers do not adversely affect the job opportunities, wages, and working conditions of U.S. workers. This approach goes back to 1952, when the INA was first enacted. According to the House Judiciary Committee report at that time:

> While the bill will remove the [earlier] "contract labor clauses" from the law, it provides strong safeguards for American labor. [The statute] provides for the exclusion of aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor if the Secretary of Labor has determined that there are sufficient available workers in the locality of the aliens' destination who are able, willing, and qualified to perform such skilled or unskilled labor and that the employment of such aliens will adversely affect the wages and working conditions of workers in the United States similarly employed. . . . This provision will adequately provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country (U.S. House of Representatives 1952:50-51).

FROM NEGATIVE PRESCRIPTION TO POSITIVE REQUIREMENT

The original requirement for labor certification did not apply to all immigrants. It was limited to immigrants in the non-preference class,[70] as defined by the 1952 Act, and to certain non-quota classes,[71] of which certain types of Western Hemisphere immigration was the largest.[72]

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[70] The "non-preference" class included foreign nationals who did not qualify under one of the immigrant visa preference categories. Such individuals could obtain an immigrant visa if there were additional numbers left unused in the preference categories. Because of the increasing demand for immigrant visas in the preference categories, non-preference visas were unavailable for many years. Congress eliminated the provision for an unallocated non-preference group in the Immigration Act of 1990.

More importantly, the 1952 version of labor certification was stated in negative terms. Immigrants encompassed within its terms were admissible *unless* the Secretary of Labor made the prescribed certification. The provision was considered largely a standby measure, to be invoked to protect U.S. workers during times of economic necessity. The Department of Labor (DOL) in fact issued few negative certifications before 1965. The first such exclusion did not occur until 1957. Between 1957 and 1961, only six negative certifications were issued. By 1964, the number had risen to eighteen (Rodino 1974:252-53).

Part of the reason for such a small number of DOL certifications was because there was no provision for regular notification to the Labor Department. Under the procedure in force between the Departments of State and Labor at the time, reports on concentrated immigration came to the DOL from U.S. consuls abroad only when 25 or more applications from one U.S. employer were received at one post in any one year (Rodino 1974:253).

Congress revised the labor certification provision in 1965, for two major reasons. First, labor unions pushed hard to strengthen the labor certification requirement. Second, because the original version of the 1965 bill did not contain a numerical ceiling on immigration from the Western Hemisphere, requiring labor certification for most categories of immigrants from the hemisphere effectively acted as a numerical control on immigration from that region (Rodino 1974:254-55). Although the final version of the 1965 law included a numerical ceiling of 180,000 on Western Hemisphere immigration, Congress did not delete the proposed revision to the labor certification requirement.

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[71] "Non-quota" means not subject to the per-country or worldwide quotas or caps. The 1952 Act defined "non-quota" immigrants to include a variety of people, including children and spouses of U.S. citizens and immigrants from the Western Hemisphere (U.S. House of Representatives 1952:100-101).

[72] It should be noted that the labor certification requirement applied only to those immigrants from the Western Hemisphere who were *not* parents, children, or spouses of U.S. citizens or permanent residents (INA §101(a)(27)(C)). Placing such an indirect limit on immigration from the Western Hemisphere was in response to the fact that over two-thirds of all non-quota immigrants between 1925 and 1948 came from Western Hemisphere countries (U.S. Senate 1950:77).

The 1965 amendments essentially reversed the labor certification requirement. What had been a negative prescription became a positive requirement. Granting an immigrant visa or permanent resident status was now prohibited *unless* the immigrant's prospective employer first obtained a certification from the DOL that there were no U.S. workers able, willing, qualified, and available to perform the work, and that the immigrant's admission would not affect adversely similarly situated U.S. workers.

Thus, the 1952 Act permitted economic-stream immigrants to enter the United States unless the DOL prohibited their entry; the 1965 amendments prohibited entry to such immigrants unless the DOL specifically approved it. The permanent labor certification system remains essentially the same today, 30 years later.

PAST ASSESSMENTS

The 1971 North Study. Criticism of the permanent labor certification system began almost immediately after its enactment in 1965. A 1971 study of the labor certification program by David North (under contract to the Labor Department) found the system "excruciatingly complicated." The study found that labor certification had "absolutely no impact on the macro labor market" and affected the workforce "only marginally," because it governed the admission of only 7.7 percent of foreign workers who arrived in the United States at the time (North 1971:iii). North also noted that the labor certification system had only a limited effect on micro labor markets, because: (a) there were no controls over the worker after he or she arrived in the United States; (b) only about 59 percent of the labor certifications granted at the time were actually used; and (c) about 45 percent of the labor certifications approved were issued simply to legalize foreign workers who were already in the United States (North 1971:iii). North concluded that while the labor certification program was "an interesting (if limited) experiment in social engineering," an alternative approach was needed (North 1971:172). A quarter-century later, North's critique still applies.

The 1975 GAO Report. After 1973 hearings indicated that various problems had developed with the labor certification program, Congress asked the U.S. General Accounting Office (GAO) to undertake a comprehensive review of the program. The GAO completed its report in 1975. It noted that it had had difficulty assessing the program because the three federal agencies that deal with immigrants did not maintain adequate and comparable data (a problem that still exists). However, based on the data it did obtain, the GAO concluded that the labor certification program had little effect because a large number of the foreign nationals who entered the United States each year, many of whom could and did enter the workforce, were not required to obtain a labor certification (GAO 1975:12).

The GAO also found that many immigrants left their certified jobs for work in other areas and occupations. For example, in a random sampling of 92 cases in which labor certification had been approved, the GAO found that 41 of the immigrants for those positions had left their jobs within one year, 27 of them within six months (GAO 1975:33). The GAO did not specify what kinds of jobs these were. The GAO also cited a 1973 study conducted for the DOL (North & Weissart 1974) which found that almost 57 percent of labor certification beneficiaries changed occupations (not just jobs) within two years after receiving labor certification (GAO 1975:34).[73]

The percentage of economic-stream immigrants who change jobs or occupations may be even higher now, 20 years later, because of the increasing mobility of the U.S. workforce generally.[74] This mobility undercuts one of the principal reasons for labor certification: to allow a foreign worker to hold a specified job at a specific time *because of the unavailability of qualified U.S. workers for that job.*

The 1990 REA Study. Another study of the permanent labor certification program was conducted in 1990 by Research and Evaluation Associates, Inc. (REA) for the DOL. Among other things, the REA's closely guarded study found that, if the purpose of the labor certification process was to test the labor market, then the system failed. Overall, U.S. applicants who were referred for positions covered by labor certification applications were hired in just *one-half of one percent* of the cases in 1988. Some employers in fact identified U.S. workers whom they rejected for the advertised job opening (because the opening was not "real") but found nonetheless so qualified that they placed them in other jobs in the firm. Many among the remaining 99.5 percent of U.S. applicants incurred the costs of applying and interviewing for jobs that simply were not open.

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[73] See also North 1971:141, citing a 1968 New York State DOL survey of 600 immigrant maids that found that, of those who worked for the employer listed on the labor certification application, only 40 percent were still there a year later. A more recent report done for the Quebec immigration ministry has found that about half of the economic immigrants surveyed who arrived between 1987 and 1991 have changed jobs since their arrival in Quebec (LeMay, 1994).

[74] More than 60 million jobs are estimated to change hands in a typical year in the United States. Although the evidence is not unequivocal (see Herzenberg et al. 1996), it appears that there has been a sharp increase in the number of people changing jobs over time. For instance, 47 percent of men changed jobs two or more times in the 1980s (*Washington Post* 1995:A16). The increase in job changes (or, put negatively, the decrease in job tenure) appears to apply to every age group, race, and education category (National Commission for Employment Security 1995:iii).

Moreover, fewer than 10 percent of labor certification applications reaching DOL regional offices in the mid-1980s were denied. REA concluded:

> [T]he procedures specified in the labor certification process to recruit and identify qualified and available U.S. workers are not effective. . . . If significant numbers of such U.S. workers exist, the specified advertising and job search activities do not reach them. Alternatively, if there are not significant numbers of U.S. workers to be found, it would appear that alternative procedures could be considered which would require less effort on the part of both the employer and the government (REA 1990:x).

The 1993 Bruening Report. A more recent authoritative analysis of the labor certification and labor attestation systems by Thomas Bruening, former longtime chief of labor certification at DOL headquarters, also questions these processes' purposes and outcomes. Like previous studies, Bruening points out that less than 10 percent of all foreign workers must go through some DOL "protective process" (labor certification or labor attestation) to be able to work legally in the United States. Bruening asks:

> [I]f there is so little concern . . . for the 90-plus percent coming in with no protective process, why spend so much time, energy and money on the less-than-10 percent . . . ? DOL, in administering the labor certification and attestation processes, stands at the gate, making sure certain foreign workers wishing to enter meet certain criteria designed to protect the interests of U.S. workers. The only problem is that on either side of the gate there are no walls! Other foreign workers, both legal and illegal, are streaming in on both sides of the gate without any screens or tests applied (Bruening 1993:8).

Bruening also points out that because of the annual numerical caps on the second and third employment-based preference visa categories, there would be little change in the effect on U.S. workers even if there were no labor market test of any kind.

THE PREVAILING WAGE PROBLEM

Bruening and others also point out the difficulties in determining the appropriate wage for permanent labor certification and attestation purposes. An employer is supposed to pay the "prevailing wage." Determining the prevailing wage is not easy, however. For labor certification purposes, the DOL uses the arithmetic mean wage, usually derived from small, non-random samples, with very few controls as to the universe of firms chosen for the survey or the definition of the occupation (DOL 1995a:2). Moreover, state employment security agencies (SESAs) differ in how they conduct their prevailing wage surveys. Some states use more sophisticated survey techniques than others. Some make more distinctions within occupations and recognize more bases for differentials. As a rule, the statistical validity of SESA surveys varies from totally invalid to valid-with-strong reservations. DOL officials are brutal in their observations about the quality of SESA wage surveys. They note:

> Few SESA conducted surveys . . . are meeting DOL requirements in terms of methodology, statistical validity, and scope, which make enforcement under the programs very difficult. More resources would be required to do them properly. These prevailing wage activities are very costly and are done for the benefit of a few employers. New approaches, methodologies, and cost factors need to be considered (DOL 1995b:4).

While employers are free to challenge a SESA's prevailing wage determination, the irony is that they must show that *their* evidence is based on methodologically sound survey procedures.[75]

There is also a timing problem with prevailing wages for permanent labor certification cases. The wage determination is made at the time the labor certification application is filed (often using data that are already dated), but the visa issuance in the case may come years later, by which time the prevailing wage may have changed significantly.

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[75] Larger firms frequently conduct or purchase specialized wage surveys for a variety of purposes. Smaller companies, especially businesses outside of major metropolitan areas, may have problems conducting or buying methodologically sound wage surveys.

Most seriously of all, prevailing wage determinations as they are presently practiced offer perverse incentives to employers for preferring foreign workers over U.S. workers. This is because prevailing wage surveys consider only cash wages. They do not include other forms of compensation that may be received by the immigrant's U.S. colleagues—bonuses, vacations, health insurance, in-kind subsidies for housing or transportation, etc. Conversely, wages of foreign workers may be mistakenly inflated by the inclusion of certain forms of "compensation"—such as the cost of employer-paid travel to the United States—that the foreign workers do not actually get in wages. This combination of adjustments to wage determinations has the unfortunate effect of making many foreign workers cheaper than U.S. workers to an employer—an advantage that an unscrupulous employer will seek to exploit.

The DOL has long recognized the problem of inconsistent prevailing wage determinations. The problem has grown more acute since 1990, when Congress imposed a prevailing wage requirement as part of the H-1B attestation process. Currently, the SESAs receive over 60,000 requests for prevailing wage determinations each year, and they must conduct over 10,000 surveys annually, at a cost to the DOL of nearly $20 million (DOL 1995b:4).

In 1992, the DOL created a prevailing wage advisory panel to review existing methods and procedures. The panel made 29 recommendations for improving the determination of prevailing wages. These included: focusing on skill levels rather than years of experience to determine where an individual fits within an occupational range; using the median wage rather than the weighted arithmetic mean in certain wage surveys; and allowing employers to use fringe benefits in certain circumstances as part of the overall wage.

Despite these recommendations, so far the DOL has made no significant changes. Instead, it has issued a long memorandum trying to clarify various prevailing wage issues (DOL 1995a:2), some of which serves only to aggravate the problems in this area. For example, the new memo instructs SESAs to acknowledge just two skill levels for any particular occupation: entry and experienced (DOL 1995a:5-6). While this makes it easier for SESAs and simplifies DOL investigations, it does not accord with business reality, in which employers may set a variety of skill levels (and corresponding wages) within an occupation, depending on professional accomplishments, length of experience, responsibilities involved in the job, and other individual and contextual factors. For example, a computer software company may have five different levels of computer programmers and pay each level a different wage. For immigration purposes, however, SESAs are supposed to calculate just two prevailing wages: one for entry-level computer programmers, the other for experienced programmers.

The new DOL memo causes additional problems by instructing SESAs to ignore the nature of the employer in making prevailing wage determinations. Thus, the same prevailing wage for a given occupation applies to all employers, whether they are public or private, academic or non-academic (DOL 1995a:5). This poses particular problems for non-profit entities and research universities, which typically pay less than private companies do, often in return for making the individual more competitive for better jobs and higher wages in the future. As Rep. Lamar Smith, chairman of the House Judiciary Committee's Subcommittee on Immigration and Claims, wrote in a recent letter to DOL Secretary Robert Reich:

> Identically-skilled jobs at fundamentally different employers are not comparable . . . . The nature of the employer alters the context of the job, the prestige of the job and the rewards of the job—in effect, it alters the job itself. Comparing universities and industrial companies [for prevailing wage purposes] fails to recognize the intangible benefits of working in a university that might make salary a secondary factor for a scientist" (Smith 1995:3).

PROTECTING U.S. WORKERS—OR A MATCH OF WITS?

The labor certification system has lost even the appearance of protecting U.S. workers and jobs. A majority of labor certification applications involve designing the job advertisement to fit the foreign worker and thereby enable the employer to reject U.S. workers as unqualified. Anyone skimming the classified ads in a large metropolitan newspaper can quickly distinguish a regular help wanted ad from a labor certification ad. The former are typically short and to the point; the latter are much longer, because they must track the exact language of the detailed job description filed by the employer on the labor certification application. Moreover, labor certification ads instruct interested applicants to contact their local SESA, not the employer. The employer's name cannot even be mentioned in a labor certification ad.

The process thus often pits clever employers and immigration lawyers against the DOL's restrictive recruiting requirements. For example, if a newspaper ad is required, employers may try to place the ad on three days when fewer people are likely to read the help wanted ads (typically Tuesday through Thursday). Alternatively, if the SESA requires an ad to be placed in a professional journal, the employer may try to put the ad in a publication the title of which sounds appropriate, but which the employer knows is read by fewer people in the field, or by people in a slightly different sub-specialty. In either case, because an employer must consider all U.S. workers who apply for the job opportunity, an employer intent on hiring a pre-selected foreign national tries to limit the number of U.S. applicants who will apply—just the opposite of normal recruiting practice.

Other "protections" also fail. For example, the employer may theoretically reject U.S. applicants only if their resumés clearly show that they fail to meet the minimum requirements for the job. If the resumé is ambiguous, the employer must interview the applicant, either in person or by phone. The employer must contact a qualified applicant promptly after referral by the local SESA or face possible denial of the labor certification application.[76] Employers can reject U.S. applicants only for "objective" job-related reasons, not for subjective criteria such as apparent lack of motivation or a person's seeming disinterest in the job.

In the end, however, motivated employers who are willing to invest the necessary time and money can get their labor certification applications approved. As the REA study found, thousands of U.S. workers a year are referred to the advertised job opening, but virtually none are hired. The complexity and increasing irrelevance of labor certification regulations regularly transform the certification process into a cat-and-mouse game between employers and immigration lawyers, on the one hand, and SESAs and the

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[76] All SESAs now send follow-up letters to U.S. applicants to inquire whether they have been contacted promptly and/or treated fairly by the employer.

DOL on the other. Each side matches wits against the other. SESA and DOL certifying officers can delay a decision on a labor certification application by requesting more information from the employer, or by requiring them to re-advertise because they did not comply precisely with all the regulations. In the final analysis, however, SESA and DOL regulators can never be as familiar with an employer's business or industry as the employer, and they have many cases to decide with relatively few resources. Furthermore, as a practical matter they cannot independently investigate an employer's claims unless they strongly suspect fraud. Thus, they must typically rely on the employer's written documentation and, increasingly, on questionnaires they send to U.S. job applicants—the latter process being one of extremely uncertain payoff. Hence, the written record becomes the battleground for deciding labor certification applications, and the side with the best documentation usually wins.

Everyone is a loser in this process. Employers with legitimate needs—and most employers' needs are legitimate, even when employers are predisposed toward hiring or retaining a foreign employee whose characteristics they deem desirable—must go through an often irrational and always time-consuming and expensive process to obtain access to a needed employee. The government loses, in that it is forced to play by—and defend—a process that is resource-intensive and perverse in both execution and outcome and offers ample grounds for cynicism among those who participate in and observe it. Worse off still are U.S. workers who believe that the job openings being advertised in this process are actual job vacancies.

Many U.S. applicants thus become pawns in this process, and virtually all SESA and DOL officials acknowledge that the labor certification system does not protect U.S. workers. As a recent internal Employment and Training Adminstration (ETA) memorandum to Secretary of Labor Reich noted: "The programs as authorized by the [INA] are flawed and do not serve U.S. workers well . . . . U.S. job applicants have little real chance of being accepted for many positions (DOL 1995d:1)."

POTENTIAL IMPACT ON LONG-TERM SOCIETAL INTERESTS

Perhaps the most damning criticism of the current labor certification process, however, is that *it focuses on the wrong goal.* As noted in Chapter 1, it is anchored in a decades-old understanding of the U.S. economy and the role that foreign workers play in relieving labor "shortages." That concept is strikingly at odds with today's competitive realities, where firms often choose workers (U.S. or foreign) because of small differences in qualifications (both in quality and in the specificity of skills) that can lead to substantial differences in the firm's ability to compete.

Indeed, the present certification process may actually undermine work-place principles that stand at the core of broader societal interests. For instance, if a minimally qualified U.S. worker applies for a job, labor certification is supposed to be denied, even if the foreign national is eminently more qualified and could presumably make a much bigger contribution both to the firm that would employ him and to the U.S. economy over the course of his or her working life.

Furthermore, when only the most motivated employers will put up with the system's onerousness and delays, the system is vulnerable to those who would "play" it for purposes for which it is not intended. Thus, a few employers could actually be using the system to bring in their relatives. Others may pass on the costs of the certification process to their foreign-born employees through lower wages while they are awaiting certification, which could drive down wages for the U.S. workers working alongside them. This is not something a government program should tolerate or encourage.

Immigrants are permanent additions to our society. The long-term goal of the economic immigrant selection system should be to allow employers to bring in workers with a mix of skills, experience, education, and other characteristics that maximize the probability of long-term labor market and economic success. The current system—especially if it is applied more stringently, as some would advocate—would hamper the efforts of some U.S. firms to remain or become fully competitive in the global economy and might even harm U.S. long-term economic interests, without offering substantial additional benefits to U.S. workers. This may well be the most telling critique of labor certification and the most compelling argument for its replacement.

IS A FLAWED SYSTEM WORTH SAVING?

Proponents of the status quo claim that the current system has some advantages. It gives the appearance of rigor, even if it is not rigorous. Only employers who show that U.S. workers are unavailable for a particular job at a particular place and point in time can petition for a foreign worker, which presumably decreases the overall number of such workers in the United States. Furthermore, the very cumbersomeness of the process discourages frivolous applications.

Under this line of argument, the labor certification system's effectiveness would be measured not by how many applications are approved, but by how many applications fail, and especially by those applications that are not filed in the first place because of the process itself. Cumbersomeness for its own sake, however, cannot be a substitute for robust policies that are properly conceived and executed. Frivolous applications should be weeded out through clear rules and effective, targeted enforcement, not by making the whole system so bureaucratic that it deters both meritorious and frivolous applications.

The DOL has long acknowledged the system's inherent weaknesses. However, in yet another attempt to address them, the DOL has begun a "re-engineering" effort to streamline procedures, save money, improve effectiveness, and better serve its customers. It has solicited comments from the public through a Federal Register notice and has set up three internal re-engineering task forces: one for the permanent labor certification program; one to resolve related H-1B issues; and one to study prevailing wage problems. The DOL estimates that it may take up to two years to complete its re-engineering process. Only then would new regulations be proposed. Thus, absent congressional changes in the interim, the labor certification morass will continue, at a high cost to everyone involved.

POST-ENTRY CONTROLS: ATTESTATIONS

Besides labor certification, Congress has created several types of attestations in an effort to devise a simpler mechanism that reduces up-front barriers to the entry of needed foreign workers but still seeks to protect U.S. workers through post-entry enforcement of the terms and conditions of employment.

The first attestation system was enacted as part of the Immigration Nursing Relief Act of 1989, which expired in 1995. Under this system, a health care facility had to attest to six criteria (see box 2-11, p. 96) before it could hire an H-1A foreign nurse. As noted in Chapter 2, three more attestation systems for non-immigrants were created in the Immigration Act of 1990. One is for crewmembers in the D visa category; another is for foreign students in the F visa category; and the third is for specialty occupation workers in the H-1B category. The H-1A attestation process was arguably the most complex and intrusive of the four systems, because it required an employer to take "significant steps" to recruit and retain U.S. nurses. None of the others places an affirmative obligation on employers to try to reduce their use of foreign workers.

In concept, attestations have several positive attributes. First, if conceived and implemented well, attestations can balance the need to safeguard and advance the interests of U.S. workers while also offering most employers predictable access to needed foreign workers. Second, attestations meet an important "public process" test by giving potentially affected parties an opportunity to know about and challenge the matters to which an employer attests. Third, properly conceived and executed post-entry tests can be among the mechanisms most responsive to changing conditions in labor markets, while requiring the least amount of hands-on engagement by the U.S. government in an area where both data and procedures are weakest. They can also be an inducement to cooperative labor–management relations in instances where workers' representatives and management work together to obtain the best worker available for a job opening.

However, attestations, at least as presently practiced, have a number of shortcomings. Some of these are similar to problems in the permanent labor certification process. For example, determining the appropriate prevailing wage can be quite difficult for both the employer and the DOL. Furthermore, some documentation requirements of an attestation are quite burdensome. For example, an H-1B employer's documentation must include information about all other employees in the same job in question, from the date the H-1B labor condition application was filed throughout the period of employment. An employer must also specify the basis on which he or she calculated the actual wage to pay the H-1B employee. Attestations also have the potential for becoming pawns in instances of troubled labor relations if worker representatives choose to interfere systematically with management's access to foreign workers by frivolously challenging attestations.

In the end, all systems that rely on individual units of assessment for choosing labor-market–bound immigrants, whether they be labor certification or attestations, are complex, resource-intensive, and raise the question whether the actual benefits justify the costs. Our answer to the permanent labor certification system is a reluctant but nonetheless firm "no"; labor certification no longer has a place in the U.S. economic immigrant selection system. Attestations must also be re-thought, however, to try to make them truer to the twin goals of providing realistic protections for U.S. workers while also allowing corporate citizens access to certain needed workers.

THE EUROPEAN MODEL

Most European countries have developed extensive and complex systems to regulate the admission and employment of foreign workers, particularly those coming from outside the region. It is not fully accurate to speak of a "European" model, in that individual country practices often vary. Most European countries (fifteen at last count) belong to the European Union (EU), however, and are moving toward convergence on several immigration matters (see Papademetriou 1996). Furthermore, even European countries that are not members of the EU are in various stages of developing similar administrative regimes on this issue.

For those concerned that economic-stream immigration displaces domestic and other eligible workers, the European systems appear at first glance to offer a model the United States could emulate. Appearances can be deceiving, however. In practice, European regulatory regimes are much less effective than they appear in controlling the economic immigration process, which remains employer-driven and allows many economic sectors to employ foreign workers with a minimum of process. Furthermore, the regulations often seem to have only a marginal effect on either deterring domestic employers from using foreign workers or encouraging them to recruit domestic workers.

Nearly 40 years after much of advanced industrial Europe began its large-scale guestworker programs and two decades after it officially ended them, the key policy priority is protection of national labor markets through severe limitation of the number of non-EU nationals admitted for work-related reasons. This goal is understandable, given a Europe-wide unemployment rate that has exceeded 10 percent for most of the 1990s.

Thus, European policy and, to a lesser degree, practice with regard to economic-stream immigration focuses squarely on giving preference to one's own and other EU nationals when a job opening exists. As was the case in the guestworker programs of the 1960s and 1970s, admission of non-EU nationals is almost always *tempo-*

rary. A complicated system of residence permits, which are issued initially for only one year and typically by different authorities than those issuing the work permits, reinforces that temporariness.

More generally, European governments seek to safeguard the job opportunities of their nationals, the nationals of their EU partners (who are free to move anywhere within the Union and have fully equal labor market rights in virtually all instances), and to a lesser degree other foreigners who are legally entitled to work.[77] Only after an intense labor market test are nationals from countries other than those specified above allowed to enter an EU country to work, or is an employer authorized to import and employ such foreign nationals.

The typical European labor market test is a variant of the U.S. case-by-case labor certification system, which seeks to establish the availability of qualified nationals and other authorized workers for the proffered position. Specific procedures for authorizing the entry of foreign workers differ somewhat among European countries. Generally, however, a work permit is issued for a specific position at a specific firm for a limited time (usually no more than a few years). Job changes are generally not permitted without application for a new permit. In addition, some national authorities have the legal power to refuse an application on the ground that an industry is already "saturated" (see Robin and Marie 1995:13). Conversely, authorities also have the discretion to exempt specific job categories, and even entire economic sectors, from labor market tests and thus in effect grant "blanket" work authorizations. Specific exemptions are most likely to occur at the extremes of the jobs' hierarchy—with job requirements or pay being key determinants. In addition to some high-level managerial and professional personnel, agriculture, fishing, certain sub-sectors of the hospitality and tourism industries, and, in some instances, the construction sector have in the past received near "blanket" exemptions. Although recent EU-level decisions seek to restrict such discretionary actions, member states continue to retain the basic authority to do so (see Papademetriou 1996).

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[77] Among them are European Free Trade Association (EFTA) and Nordic Council legally resident foreigners, followed in turn by foreigners from third countries who may have preferential access to the labor market of a particular EU member state because of special bilateral arrangements.

PETITIONING PROCEDURES AND REQUIREMENTS

In the United Kingdom (U.K.), Spain, Belgium, and the Netherlands, the employer submits the application ("petition," in U.S. parlance) for work authorization, whereas in France the employee must do so; either employer or employee may submit the application in Germany. Renewal applications (which may have additional requirements, particularly if they seek extensions beyond the customary length of about three years for such permits), as well as permission to change jobs, are usually the responsibility of the foreign employee. Applications are typically submitted to the Ministry of Labor and must be for a specific job. In certain instances, the Ministries of Social Affairs (Netherlands), Interior (Denmark), or semi-autonomous regional and local employment services (Germany, Italy) are responsible for evaluating and approving applications.

In the U.K., when a petition is approved, a permit is issued to an individual worker for a specific position for the duration of his or her contract, generally for up to four years. The permit does not allow the foreign worker to change jobs unless the employer files a new request. The program is heavily skewed in favor of highly skilled foreigners employed by successful British multinational companies. At the conclusion of the contract period, the employer may (and often does) petition the government for a permanent immigrant visa for that worker. In practice, the requirements for such conversions are generally looser than those for the initial permit.[78]

In the Netherlands, the employer is responsible for filing on behalf of his or her employee for a work permit, which may last for no longer than three years. A foreign worker may change jobs and receive a new permit after the first year without a further labor market test. The permits of foreign workers who remain with their employer for the duration of the first permit are renewed automatically. Some countries, such as Belgium, prohibit changes in vocational activity once an approved foreign worker is in the country. In France, the work permit application must be submitted by the prospective employee. However, the application may require a supplemental note by an employer to the *Office des Migrations Internationales* (OMI), stating his or her intention to hire the applicant.

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[78] Most European countries have no regular channels for the conversion of temporary foreign workers into "permanent" immigrants. Such conversions tend to occur on a case-by-case basis.

Throughout Europe the approval of a work permit application is generally contingent on the applicant's showing that no eligible resident worker is available and qualified for the position. The procedure generally requires that local government authorities verify that the registry of official job seekers in the area[79] does not include a worker who could fill the position for which a permit has been requested. Usually, the market test must be completed within a specified time period, which may last several weeks.

Employers may also be required to comply with additional procedures designed to identify nationals and other authorized workers for the available position. In Spain and the U.K., for instance, employers are required to submit proof that they have used extensive advertisements and other recruiting tools to search nationally for workers to fill the position for which a permit has been requested. Employers may also be required to demonstrate that the position could not be filled through promotion from within the firm. In Belgium, employers may be further required to verify that adequate professional training would not allow a national or EU worker to fill the position in question.

European countries employ additional devices in an attempt to shield their citizens and the broader EU labor force from competition by non-EU job-seekers. Some of the requirements are quite common and relevant to this report. For instance, many European countries—including the U.K., Germany, and France—do not issue work permits to non-EU nationals recruited by temporary employment agencies.[80] Other requirements are highly idiosyncratic. For instance, in Belgium, in addition to a stringent labor market test, the employer is required to obtain a separate authorization for the right to hire non-Belgian/EU nationals. Before granting this authorization, government authorities consider the petitioning firm's general employment conditions. Firms that petition for foreign workers repeatedly or that otherwise stray from the policy objective of keeping European jobs for Europeans (for instance, by violating Belgium's aggressively enforced employer sanctions laws) are subject to additional scrutiny and often find it more difficult to secure authorizations.

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[79] European labor markets and labor exchange functions differ greatly from their U.S. counterparts, both in how they are organized and in how they function. In most European countries, government employment services are involved in large proportions—often even the majority—of job changes. In contrast, the U.S. Employment Service and its state affiliates (the state employment security agencies) account for only around 5 percent of all job placements.

[80] This is intended to regulate subcontracting firms. Such firms are widely thought to abuse the rules regarding the "lending" of workers (see Robin and Marie 1995:11).

Additional deterrents to hiring non-qualifying foreigners exist in other countries. For instance, in Spain, a country with a particularly heavily regulated labor market, a firm may be required to create two positions if it wishes to hire a foreign worker: one for the foreigner and another for a Spaniard. In the U.K., a country with one of the most loosely regulated labor markets among EU member states—but with a resolutely anti-immigrant stance (see Papademetriou and Hamilton 1996)—an employer is required to affirm in writing that the employment of a foreigner will not adversely affect the working conditions of other employees. The vague wording of this requirement makes it difficult to enforce, but authorities feel that it is nonetheless a deterrent to the hiring and/or abuse of foreign workers.

Finally, in most European countries, the employer must also certify the specific terms and conditions of the employment contract. With the emerging exception of Germany, however, there is little tradition for enforcing such provisions aggressively. This apparent anomaly may be due mainly to most of Europe's tradition of "social partnerships," which govern much of the conduct of both employers and workers and thus make violation of such provisions less common.

EVALUATING EUROPE'S RECORD

Despite significant country differences, two overarching features define European responses to the issue of employing foreign workers. First, the systems are often extremely complex and tend to micromanage both recruitment and employment without regard to the foreigner's long-term potential to contribute to a country's economy. Second, the burdens on petitioning businesses and/or individuals are designed primarily to deter applications rather than to assess needs. In the absence of independent measures of effectiveness, European managers of these processes tend to "measure" effectiveness by the number of applications *not* filed.

By most reasonable standards, the value of the effort to restrict the admission of non-EU workers appears dubious. First, despite the stringency of the requirements, most applications filed for professional occupations are in fact approved. Second, other authorization practices, specifically those for contract and seasonal work, further undermine the protection rationale.

Specifically, although the EU attempts to place strong controls on economic immigration in principle, in practice many European countries regulate contract, seasonal, and certain other types of (usually low-wage) work by foreigners much more loosely. Germany, for instance, has been accepting nearly a quarter of a million foreign workers per year in recent years in a combination of seasonal, contract, "vocational training," and border commuting programs—in addition to allowing companies to win bids in construction projects by importing and employing non-Germans, often at much lower rates of pay[81] (see Papademetriou with Kamali Miyamoto 1996). Most other European countries have their own variants of such programs, although their size and significance are typically smaller than those in Germany. Finally, other non-EU workers enter through channels created by bilateral treaties—with workers supplied primarily by Eastern European countries to work in such industries as construction, agriculture, or tourism.

In sum, as restrictive and at least slightly xenophobic as the European system of work authorizations for foreign workers may be, it does display an ostensibly consistent policy focus: protecting European jobs. The price for this policy, however, seems to be a system fraught with a number of flaws. These include onerous burdens on business, highly bureaucratized and resource-intensive efforts at micromanagement (which typically yield marginal results), and, most significantly, contradictory practices that serve to undermine the programs' apparent policy focus. Most importantly, and notwithstanding substantial administrative hurdles to the employment of most third-country nationals, certification applications routinely have positive outcomes. It appears, therefore, that the exceptions to the rules, rather than the rules themselves, define European *practice* on these matters (see also Robin and Marie 1995).

In fact, the overall job protection scheme may suffer from as fundamental a set of internal inconsistencies as any found in the

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[81] This practice was not prohibited until mid-1995.

United States. Despite the overt and very public effort at controls, European countries in fact behave quite rationally on these issues. First, they routinely accommodate the needs of large firms to move "key personnel." Second, they acknowledge through their blanket administrative actions that EU nationals are averse to engaging in many undesirable jobs. Third, they are generally sensitive to the needs of the middle classes for household workers or workers in the "tourist" sector. Fourth, they generally adhere to their international obligations by accommodating the various trade-agreement–related movements of persons. Fifth, they are mindful of broader security and solidarity interests by offering preferential treatment in employment to nationals from the immediate region or from countries with which they have pre-existing relationships. And sixth, in many instances, they continue to offer employment opportunities to asylum seekers (although they are just as conflicted about this as is the United States).

These facts clearly indicate that the regulatory effort is directed primarily at the margins rather than the essence of the issue of protecting "European" jobs. As Robin and Marie (1995:10) point out, the most appropriate characterization of that effort is that it is guided more by substantial adaptability and pragmatic management than by inflexibility.

More significantly, perhaps, when one measures outcomes rather than processes, the United States (and among Europeans, increasingly the United Kingdom) continues to do what it seems to do rather well: create jobs, though often at subsistence wages. By contrast, most European countries continue to do what *they* have done rather well for more than a generation: (a) offer generous social safety nets to their unemployed, which act as disincentives to the acceptance of low-wage jobs (and thus make the employment of non-EU member nationals a labor market necessity), and (b) continue to erect obstacles to the *creation* of jobs through sclerotic labor and social legislation, especially with regard to tenure and benefits matters.[82] In both instances, the long-term continuation of the status quo appears unsustainable—although it could be cured by better conceived immigration regimes.

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[82] With the exception of the United Kingdom, the Continent's generous social and labor legislation offers an array of disincentives for an unemployed person to return to work quickly or for employers to create new jobs. Despite some incipient changes to these systems, both public philosophy and bureaucratic actions—even at the level of the Union—tend to reinforce these tendencies (see Papademetriou 1996).

THE LABOR MARKET INFORMATION MODEL

An alternative way to select foreign workers for job needs/openings is to use generalized labor market information (LMI). Unlike the individual-worker evaluation model, this method focuses on making gross judgments about labor shortage and surplus occupations on the basis of general labor market information gathered primarily from national-level data. General information could be generated either indirectly, through the use of aggregate data collected for other purposes, or directly, through the use of focused interviews and surveys. Employers would be allowed to bring in foreign workers freely for occupations that are determined to have a labor shortage. Conversely, they would be barred from bringing in foreign workers for occupations determined to be experiencing a labor surplus.

The United States has considered but not yet actually tried the LMI model. The DOL funded a study by Malcolm Cohen and Arthur Schwartz in the early 1980s to explore the availability of labor market information to estimate national labor shortages by occupation. The authors used a number of screening tests to determine which occupations might have a labor shortage. Cohen did another study in 1990 for the DOL that recommended using Bureau of Labor Statistics labor market data in conjunction with expert analysis to create a list of shortage occupations (Cohen 1990). Because of concerns about the methodological reliability of the proposed approaches, however, the DOL never pursued further this avenue.[83]

Despite methodological concerns and general DOL discomfort with the LMI approach, in 1990 Congress directed the DOL to conduct a three-year pilot program to determine whether the foreign labor certification process could be streamlined by supplementing the case-by-case approach with lists of occupations in which labor shortages or surpluses may exist. Under the LMI program, the DOL was supposed to make a determination that surpluses or shortages existed in up to ten defined occupational classifications. After much prompting from a congressional committee and a lawsuit by a company seeking to compel the DOL to implement the program, the Department finally published proposed regulations for the LMI program in March 1993. The proposed rule sparked controversy from several organizations that claimed the program would hurt U.S. workers by making it easier to hire foreign workers. The pilot program died a quiet death when it expired in 1994 without ever having gotten off the ground.

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[83] For a complete discussion and assessment of the LMI concept, see Papademetriou *et al.* 1989 and Papademetriou 1990.

In theory, an LMI method has several advantages over labor certification. First, it would allow the U.S. government to maintain considerable control over the allocation of foreign worker visas while costing much less than an individualized worker/job system. Second, it would allow the DOL to process applications more rapidly, since the occupations in which foreign workers could enter would be predetermined. Third, although national shortage lists may not correspond with local labor market conditions, they may be more likely than location-specific lists to ensure that immigrants who subsequently move will find a market for their skills. Fourth, the occupational list generated by an LMI system could be used to promote a more coordinated "human resources policy." Accordingly, such a list could be useful to groups concerned with broader U.S. labor market needs (e.g., educators and educational institutions in setting their priorities; career guidance specialists in helping to channel students into needed occupations; and those engaged in retraining adults for new careers).

The disadvantages of an LMI system strongly outweigh its potential advantages, however. First, the use of LMI to categorize occupations appears more "scientific" and "rigorous" than it really is. It creates an illusion of objectivity while in fact it relies to a very substantial degree on subjective judgments. Second, the data on which the LMI approach would rely were developed for other purposes and do not measure the precise concepts needed. Third, most occupational "shortages" are relatively brief in duration, and all shortages are dynamic. In fact, some of the data used to identify shortages may simply be picking up indications that the market is adjusting. Fourth, even if the U.S. government could identify occupational shortages appropriately and in a timely manner, it could not ensure the timely admission of immigrants with those skills. Because of delays in processing and possible backlogs stemming from visa numerical limitations, those skills might no longer be in short supply by the time certified immigrants "reach" (i.e., become available to) their U.S. employers.

Finally, the fundamental weakness of the LMI approach is that national data tend to "average out," and thus routinely mask often-substantial regional and local variations. By assuming the existence of a single national labor market, the LMI concept is of little assistance to making decisions about the labor needs of a local labor market, or of a detailed occupational segment within it. While an LMI methodology based on local or regional data would address this issue, it would be very expensive and difficult to create. Direct surveys of labor shortages are very costly. The cost increases dramatically with the level of occupational detail requested. In the late 1980s, the DOL estimated that it would cost about $20 million to set up the interviews necessary for such a model. Meanwhile, most of the other concerns associated with the LMI approach, including political opposition by worker organizations, would continue.

From a practical standpoint, the geographic concentration of immigrants in a few localities probably means that only a few local-area lists of labor shortages would be used frequently. However, from a legal standpoint it might be necessary to develop comparable lists for all localities in the United States, including many for which data would be difficult to obtain. Moreover, such a nationwide list of local labor shortages would become outdated quickly, would be resource-intensive to update, and would still not eliminate employers' claims that, despite LMI evidence to the contrary, they could not obtain a worker for a specific need—thus returning the entire process to its case-by-case determination roots.

Given all these problems, we do not believe that the LMI concept is the way to go.

THE POINT SYSTEM MODEL

A point system model of economic-stream immigration, at least as practiced by Canada and Australia—the other two major "immigraton countries"—differs from both the individual worker/job evaluation model and the labor market information concept. Unlike the former, a point system does not focus on matching a specific immigrant with a specific job offer in a case-by-case process. And unlike the latter, a point system neither directs nor necessarily limits immigrants to working in predetermined labor-shortage occupations. Instead, the point system evaluates and selects immigrants based on certain human capital characteristics deemed to advance the host country's interests. Those characteristics vary from country to country, but tend to include, at least for economic-stream immigrants, factors such as age, education, language, work experience, and skill levels. The theory is that selecting immigrants with the "right" set of characteristics will help the country most in the long run.

The point system can accommodate immigrants who may or may not have a specific job offer in the receiving country and who may end up working in occupations that already have adequate numbers of domestic workers. Indeed, Canada and Australia still cling to a philosophy/tradition that *uses immigrants as a mechanism for human capital accretion*. Accordingly, immigration policy is relied upon to provide some of the highly skilled technical and professional workers necessary for their expanding economies that their domestic education systems have been unable to provide in adequate numbers. Finally, although both countries now soft-pedal this element of their immigration policies, they use immigration as a population growth instrument.

In theory, a point system has several advantages over either an individual-worker/job evaluation or an LMI model of economic-stream selection:

- A point system can inspire confidence as a policy instrument that applies universal, and ostensibly hard (i.e., quantitative data-based) and objective selection criteria to economic-stream immigrants. Hence, it is less susceptible to criticisms associated with the case-by-case system's "gamesmanship" between employers and bureaucrats.
- A point system's appearance of impartiality may discourage most of those who might otherwise have been apt to challenge it, while its technical complexity and apparent responsiveness to long-term labor market needs is reassuring to many who might worry about possibly adverse effects on domestic workers.
- Finally, depending on the attributes the point system emphasizes, the model may reassure members of the receiving society that economic-stream immigrants are selected on the basis of criteria that place high priority on the country's broadest economic priorities in an increasingly competitive world. This makes the system politically more defensible than any of the alternatives discussed above.

While the Canadian Immigration Act grants the Minister of Citizenship and Immigration authority to set fixed annual or country quotas for the admission of immigrants, he has not yet invoked that authority.[84] Instead, the Department establishes global targets for the admission of immigrants by category, without regard to country of origin. The three categories are family reunification immigrants, refugees, and economic immigrants (which includes skilled workers, investors, entrepreneurs, and self-employed individuals). By law, the Minister must table in Parliament by November 1 of each year the immigration plan for the following year, by category. In 1994, the Minister set out the overall direction for Canada's immigration program, indicating the shares for family reunification and economic immigrants for the next five years (see Papademetriou 1994).

The current Canadian selection system awards points to potential workers in the following categories: education (16 points maximum); specific vocational preparation (18 points maximum); experience (8 points maximum); occupation (10 points maximum); arranged employment (up to 10 points); age (10 points if the applicant is 21-44; points deducted for being under 21 or over 44); knowledge of English or French (15 points maximum); personal suitability (10 points maximum); and demographic factor (8 points maximum). Additional bonus points are awarded if the applicant is an entrepreneur or investor (45 points), is self-employed (30 points), or has a close relative in Canada (5 points). The maximum number of points a person can obtain under this system (prior to bonus points) is 105, with 70 being required to "pass" (see figure **3-1,** p. 128).

Overall, Canada admitted about 218,000 immigrants (including refugees) in 1994. That figure is about 0.8 percent of the Canadian population. Of that total, 106,000 (48 percent) were admitted on the basis of their economic characteristics or because they were dependents of such immigrants. Within that stream, 28,000 principal skilled workers and 40,000 dependents were admitted under the point system.

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[84] This may be changing. The Minister has announced his intention to invoke this authority for 1996 immigration levels.

The Canadian system is heavily skewed in favor of highly educated applicants in highly skilled occupations. Such individuals are likely to exceed the "pass" mark even if they receive low points in other important criteria such as language. In fact, individuals in highly skilled occupations with arranged employment, or in designated occupations, can pass with virtually no English- or French-speaking ability, even though language is known to be crucial to an individual's ability to contribute to the economy most fully. This has been of increasing concern to Canadian immigration officials.

The Canadian government has also recognized that its attempt to target selected workers to specific occupations has not been successful. The time-lags between collecting and analyzing labor market data, setting targets, recruiting, and then actually receiving immigrants for those occupations are too long. Significant changes in the labor market can and do occur in the interim. Furthermore, in a rapidly changing economy, it is very difficult to predict which occupational skills Canada needs in either the immediate or long term.

For that reason, the point system is being revised.[85] The new system will emphasize attributes that suggest labor market success in general, rather than specific occupations. As the introduction to an internal white paper puts it, the selection criteria should emphasize those qualities which allow an individual to adapt to the ever-changing global economy—such as flexibility, resilience, and good learning capabilities.

The revised Canadian point system will have a maximum of 67 points and three pass marks: 52 points for professional and skilled administrative personnel; 47 points for technical personnel; and 45 points for skilled tradespeople. Education will account for up to 15 points, experience for a maximum of 6 points, age up to 9 points, knowledge of English or French up to 15 points, adaptability up to 12 points, and "labor market balance" (a subjective measure set by the Minister) up to 10 points. There is also a small bonus for pre-arranged employment or for having a relative in Canada (3 and 4 points, respectively).

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[85] Changes in the political management of the Department of Citizenship and Immigration Canada and a radical reorganization of the Department have delayed implementation of the a new point system, which was planned to go into effect on February 8, 1996. As of this writing, it is unclear when the changes will be implemented.

The revised weight factors points up the characteristics that Canadians consider important. For example, points for education (devised following studies of different cohorts of immigrants) range from 0 for failing to finish high school to 15 for having completed a Ph.D. Points for age under the revised Canadian system range from 0 to 9 in a bell curve shape; those under 18 and over 45 receive no points, while those of 25 to 35 years of age receive the maximum 9 points. Other ages receive progressively fewer points, as they move toward the two ends of the spectrum. Points for experience range from 0 to 6, with no points awarded if the applicant has less than one year of work experience; five or more years of work experience gain the applicant the maximum 6 points. Points for language range from 0 to 12 for the first language and from 0 to 3 for the second, depending on the applicant's level of fluency. Finally, points for adaptability range from 0 to 12, subjectively depending on the skills and quality demonstrated by the applicant in an interview with a Canadian immigration official.

The overhaul of the Canadian point system is part of a larger five-year strategic plan to emphasize economic-stream immigration more than in the past. In 1994, 48 percent of all immigrants to Canada were admitted because of their economic characteristics. Forty-three percent immigrated through the family stream. Canada plans to increase the economic proportion, placing "greater emphasis on attracting those with the capacity to settle quickly and contribute to Canada" (Citizenship and Immigration Canada 1994:13). Accordingly, by the year 2000, Canada aims to have 53 percent of all its immigrants admitted under the economic stream and 44 percent under the family stream.

THE AUSTRALIAN MODEL

Australia admits immigrants under three basic streams: family immigration[86], skill immigration, and humanitarian immigration. Within the skill stream there are five subgroups: Independent Immigration, Business Skills, Labour Agreements (Tripartite Negotiated Arrangements), Employer Nominations, and Distinguished/Special Talents.[87]

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[86] The Australians use the term "migration," rather than "immigration" in most of their programs. We have elected to use *immigration* throughout for consistency with the rest of the text.

The Independent Immigration subgroup is responsible for the largest share (49 percent in 1994/95) of the skilled intake in Australia. Applicants are assessed against a points test that evaluates their skill, age, and English-language ability, in that order of importance (see figure **3-2**). Up to 80 points are awarded for the skills component of this points test. If the particular skill is among the designated occupations requiring English, the applicant must be fluent in English. Other applicants can receive up to 20 points on the language component of the points test. Finally, applicants in the Independent Immigration subgroup can receive up to 30 points on the age component. Zero points are allocated to applicants younger than 18 or older than 50. Overall, the maximum number of points possible in the Independent Migration subgroup is 130, with 110 required to pass as of December 1, 1995—up from 100 points before that date.

The Business Skills subgroup, originally begun in the 1980s as the Business Migration Program, has a separate point system that initially focused not on skills but on an applicant's potential for supplying and attracting funds for investment in Australia, as well as on business acumen. The Program's goal was to increase Australia's export market, employment rate, and technological innovation. It was subject to abuse, however, and many Australians viewed it simply as a means of buying one's way into the country. A Parliamentary investigation eventually recommended revising the program.

In 1992, the Program's name was changed to Business Skills, indicating a shift in focus from applicants' capital base to their skills. Applicants in this subgroup are now evaluated primarily on relevant experience within a business field. The points test examines applicants on the basis of the business history and assets of

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[87] There is also a special category called "1 November," which refers to a November 1, 1993, decision by the Australian government to select for permanent residence some nationals from the People's Republic of China (primarily students) who had arrived in Australia after the Tiananmen Square massacre or who were afraid to return to it following the massacre. While not formally considered refugees, these individuals were selected for permanent residence on the basis of a simplified points tests, which evaluated age, education, language ability, and employment. This special category is not discussed further in this chapter or included in any calculations. See Papademetriou and Nahapetian 1996 for a discussion of the Australian immigration system.

3-2. The Australian "Independent Migrant" Selection System

Category	Qualifications	Points	Maximum
Education/Skills/ Work Experience[a]	Trade certification/degree/diploma, with 3 or more years post-qualification work experience, and included on Priority Occupation list	80	**80**
	Trade certification/degree with 3 or more years post-qualification work experience	70	
	Trade certification/degree with 6 months to 3 years post-qualification work experience	60	
	Diploma with at least 3 years post-qualification work experience	55	
	Diploma with 6 months to 3 years post-qualification work experience	50	
	Trade certification/degree/diploma (assessed by authorities as requiring only minor upgrading) with 3 or more years post-qualification work experience		
	Trade certification/degree/diploma but qualifications deemed unacceptable	30	
	Post-secondary school qualifications	25	
	12 years of primary and secondary schooling	20	
	10 years of primary and secondary schooling	10	
	Less than 10 years schooling	0	
Age	18 to 29 years	30	**30**
	30 to 34 years	25	
	35 to 39 years	15	
	40 to 44 years	10	
	45 to 49 years	5	
	Less than 18 or more than 50 years	0	
Language Ability	Proficient in English	20	**20**
	Reasonably proficient in English	15	
	Level of proficiency at which some training is required	10	
	Bilingual in languages other than English, or only limited English	5	
	Extensive English training required	0	
Pool Mark	100 points		
Pass Mark	110 points		
Maximum Points Available	130 points		

[a] The qualifications and experience listed are those needed to work in the immigrant's "usual occupation," referring to a job done for a continuous period of at least six months in the two years immediately preceding application for immigration. To qualify for the point levels listed, a potential immigrant's qualifications must be assessed as both equivalent to the Australian qualification and relevant to the person's usual occupation.

Source: Australia Department of Immigration and Ethnic Affairs. 1996. Migrating to Australia: The Points Test. Canberra, ACT.

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both the applicant and his or her spouse, the number of potential employees the proposed endeavor might employ, the venture's potential for transfer of funds and capital, and the principal's age and language skills. Extra points are given for experience in a field, such as trade or manufacturing, that may benefit Australia. Yet another safeguard against abuse has been the creation of an expert panel of government and business members to evaluate the applicants (Papademetriou and Nahapetian 1996).

The Australian government uses a variety of ways to measure English-language ability for its point systems. Applicants who present evidence that they have at least a three-year degree and that all instruction for that award was conducted in English automatically receive the maximum number of points awarded in that category. Alternatively, applicants can take one of three standardized tests to measure their English ability. How well they do on the test determines how many points they receive. Applicants who have less than "functional" English[88] but who otherwise pass the points test must agree to sign up for a specified English language course within three months after immigrating. The government charges such applicants between $1,000 and $3,000 (depending on the visa category in which they enter) to help defray the cost of the course and to make sure that they actually take the class.

Unlike Canada, Australia no longer measures subjective characteristics such as adaptability in its point system selection process. The Australian government included adaptability characteristics in its point system in the late 1970s and early 1980s, but abandoned them in favor of more objective criteria like skills, age and language. The Australians feel that these criteria are adequate proxies for adaptability.

Australia admitted about 76,500 persons in the 1994/95 fiscal year in the family and skill streams. Of that total, 44,500 were admitted in the family stream. Of these, 7,700 were points-tested "concessional" family members.[89] Another 30,400 were admitted in the skill stream, of whom 15,000 were in the Independent Migration subgroup, and 2,400 were in the Business Skills subgroup.

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[88] The Australian government defines functional English as the ability to read, understand, and communicate verbally and in writing about familiar topics and in a variety of everyday settings, despite some errors.

[89] Concessional family members include non-dependent children, parents who have certain children overseas, siblings, nephews, and nieces. Such family members are reviewed under a points test that evaluates family relation, skills, age, and sponsor elements (duration of citizenship, relationship, employment status, and settlement location).

Use of the point system has helped raise overall skill levels for Australia, as it has for Canada. Australia measures the skill level of its immigrant intake as the proportion of immigrants, including family members, who before migrating were employed mainly as tradespeople or in managerial, administrative, professional, or para-professional occupations. An estimated 70 percent of immigrants who worked before migrating to Australia in 1993/94 were skilled workers. This compares to the skill level of 43 percent for the Australian workforce generally as of August 1993 (DIEA 1995:26).

Australian government officials believe that their point system works well for Australia, for several reasons. First, it is a relatively small program; only 17,400 people were admitted to Australia under their two economic point systems in 1994/95. Second, the Australians have established an adequate data system to help evaluate and fine-tune the program. Third, Australia has made a long-term commitment to assessing its workers' skills. None of these factors currently exist in the United States.

COMPARISON OF THE CANADIAN AND AUSTRALIAN POINT SYSTEMS

One of the chief differences between the Australian and the proposed Canadian systems is that the Australians award points partly based on occupation, while the Canadians will no longer do so under their revised system. This difference may be more subtle than it appears at first, since the Australians use occupation essentially in combination with education (i.e., education points are awarded for intended employment in an occupation requiring a certain number of years of training or education—a concept not too different from the existing Canadian system or the SVP concept in the U.S. labor certification program).[90]

Both Canada and Australia have stopped awarding points on the basis of "shortage" occupations. The explanation is fairly simple. First, doing so is analytically very difficult, because it requires the conceptualization and measurement of a particularly elusive concept (shortages).[91] Furthermore, immigrants (like workers in general) often change jobs after they immigrate—to the betterment of themselves and typically the economy. Thus, it makes little sense to evaluate prospective immigrants (and their likely contributions as permanent members of society) on the basis of the job they happen to take immediately after entry. Instead, it makes far more sense to guard against inadvertent failures and abuses of the system by watching the system's outcomes closely, as both the Canadians and Australians seem to do quite well.

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[90] See Chapter 2, fn. 47 (p. 60) for a description of the SVP.

The role employers play in the admission process differs between Canada and Australia. The Canadians now give 10 points if the immigrant has a validated job offer in Canada but plan to reduce that number to three points. Part of the rationale for the change is that, with 10 points, a person could now sometimes qualify for immigration without having a firm enough command of English or French or sufficient education to be able to compete effectively in the Canadian marketplace if he or she were to change jobs or be laid off by their first employer. Although having a job aids the immigrant's economic adjustment to the host society and increases the probability that he or she will ultimately succeed in the workforce, Canadian officials now believe that their system placed too much emphasis on this factor, and the new system is to reduce the number of points awarded for a job offer to three.

In Australia, on the other hand, employer-sponsored immigrants enter in a completely separate category, which has nothing to do with the "independent" stream (admitted through the point system). An employer-sponsored immigrant must intend to fill a job vacancy that cannot be filled by an Australian, must have skills and experience to match the vacancy, and must be younger than 55. The employment service in Australia determines when a vacancy cannot be filled by an Australian and consequently holds the power to approve or deny the employer's nomination.

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[91] Trying to measure and define a labor market shortage is even more elusive in the United States, which has dynamic labor markets that are less strictly organized than those in Australia and Canada.

LESSONS FOR THE UNITED STATES

Can a point system work in the United States? The answer is a qualified "yes," but only if the concept is adapted to the idiosyncrasies of the U.S. economy, philosophy (especially with regard to the proper role and reach of government in social and labor market matters), and labor market realities.

On the one hand, despite inevitable variations that stem from location and history, the origins, scale, and composition of most immigration to Canada and Australia has not looked all that different from ours. As in the United States, Europeans dominated immigration flows to Canada and Australia in the 19th century and the first half of the 20th century. Like us, Canada and Australia closed their doors to most Asian immigration in the 1920s; and like us, they reversed that policy and adopted race/ethnicity/country-of-origin-neutral policies in the 1960s—in both instances for reasons that closely parallelled our own. Today, in all three instances, a similar list of Asian countries provides a growing share of total immigration, and European immigration is diminishing as a percentage of overall flows, despite efforts to stop and reverse the decline (see Papademetriou 1994; Papademetriou and Nahapetian 1996). The broad configuration of the Canadian and Australian systems is also similar to ours—primarily family-based, with strong components of economic-stream immigration, as well as refugee and temporary migration systems.

On the other hand, the size, global reach, and orientation of the U.S. economy differ greatly from the economies of Canada and Australia. As discussed in Chapter 1, today's U.S. economy is intensely export-oriented, and many of even its smaller companies operate throughout the world. Much more than most Australian and Canadian companies, they are accustomed to and must have access to a *global* labor force. Immigrant labor—by moderating wage inflation—has provided a key competitive advantage internationally. Moreover, U.S. immigration philosophy and practice reinforces adherence to that principle in both the permanent and non-immigrant visa systems. By contrast, and in relative terms, Canada trades almost exclusively (in terms of transnational volume) with the United States, with whom it has special immigration relationships—most recently codified in NAFTA—that give many Canadian professionals unencumbered long-term access to the U.S. labor market (and vice versa). With few exceptions, Australia's economy is even smaller and more domestically oriented.

Furthermore, the U.S. labor-market philosophy differs substantially from that of other industrial countries, not just Canada and Australia. The idea of a "social contract" between government and individuals is weaker in the U.S. compared with most European and other industrialized countries, and the role of worker organizations has been weak and is declining. The United States places far greater emphasis on limiting the role of government in regulating the labor market; indeed, the U.S. labor market is probably less regulated than that of any other advanced industrialized country.

There are several additional reasons why point systems that appear to work in Australia and Canada would require special discipline if they are to be effective in the United States. First, the flow of economic migrants to Australia and Canada is much smaller and in some ways more homogeneous than the flow of economic immigrants to the United States (see figure 4-3, p. 184). Thus, it is much easier to observe all the intricacies of the system at work and much easier to fine-tune the system in these countries (see Papademetriou 1994). By contrast, the United States is a global giant, with all the complexities that entails.

Second, the overall system of government and set of political pressures (especially regarding immigration) are different in Canada and Australia than they are in the United States. This affects the key feature of a point system—flexibility. In fact, the history of point systems in both Australia and Canada has been one of experimentation and evolution. The system itself is designed to adopt new categories of desired characteristics, discard obsolete categories, and "tweak" the process by changing the categories' relative weights. The "magic" of a point system is that it can respond quickly to shifting economic priorities and/or perceptions of what is "good" for the economy. A parliamentary system is well-suited to make these changes readily and with expenditure of relatively little political capital. At the minister's direction, the immigration ministry professionals come up with a plan to adjust the categories and their relative weights, and within a few months the plan can have cabinet approval, if such action is necessary. In many instances the changes can be accomplished administratively, under broad grants of authority delegated by the relevant statute. By contrast, the U.S. system is deliberately designed to work more

3-1. The Current and Proposed Canadian Skilled Immigrant Selection Point Systems

CURRENT SYSTEM				PROPOSED SYSTEM		
Category	**Qualifications**	**Pts**	**Max**	**Qualifications**	**Pts**	**Max**
Education	Secondary school not completed Secondary school completed without qualification for further university, trade, or occupational training Secondary school with qualification for university entrance Secondary school with trade or occupational qualification Completion of post-secondary program requiring secondary school diploma for entrance (must include 1 year full-time) Post-secondary program requiring university-qualified secondary school diploma for entrance (must include 1 year full-time) First-level university degree requiring at least 3 years full-time study Second or Third level university degree	0 5 10 10 10 13 15 16	**16**	Secondary school not completed Secondary school, apprenticeship, trade, or occupational certification completed Post-secondary education other than university First-level university degree requiring at least 3 years full-time study Second-level university degree Third-level university degree	0 6 10 11 13 15	**15**
Vocational Preparation	Based on specific vocational preparation (SVP)	1-18	**18**	Not applicable	—	—
Work Experience	Years of Experience in Occupation SVP Time Needed: 1 2 3 4 less than 3 months: 2 2 2 2 3 months - 1 year: 2 4 4 4 1 to 4 years: 2 4 6 8 4 years or more: 2 4 6 8	2-8	**8**	Less than one year One year 2 years 3 years 4 years 5 or more years	0 1 3 4 5 6	**6**
Occupation	Up to 10 points if occupation appears on list of "Designated Occupations" 0 is an automatic processing bar	0-10	**10**	Not applicable	—	—

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Arranged Employment	Up to 10 points if occupation appears on list of "Designated Occupations" No penalty if not obtained	0-10	10	Not applicable	—	—
Age	Less than 16 years 17 18 19 20 between 21 and 44 years 45 46 47 48 49 and above	0 2 4 6 8 10 8 6 4 2 0	10	Less than 19 19 20 or 21 22 or 23 24 25 to 35 36 to 39 40 41 42 43 44 45 Over 45	0 2 4 6 8 9 8 7 6 5 4 3 2 0	9
English/ French Language Ability	Speak, Read, or Write — 1st Language — 2nd Language fluently 3 2 well 2 1 w/difficulty 1 0	1-15	15	— 1st Language — 2nd Language fluent 12 3 functional 8 2 w/difficulty 2 1 no ability 0 0	12-15 8-10 2-3 0	15
Suitability/ Adaptability	Based on officer's assessment of adaptability, motivation, initiative, etc.	0-10	10	Based on skills/qualities demonstrated by the applicant	0-12	12
Misc. Factors	Demographic Factor – Set by Minister	0-8	8	Labor Mkt. Balance Factor – Set by Minister	0-10	10
Pass Mark	**70 points**			**45 – Skilled Trade Workers 47 – Technical Workers 52 – Professionals and Skilled Administrative Workers**		
Total Points			**105**			**67**
Bonus Categories	Entrepreneurs and Investors Self-employed persons Assisted Relatives Bonus	45 30 5	**45** **30** **5**	Assisted Relative Bonus Arranged Employment	4 3	**4** **3**

Source: Immigration and Citizenship Canada, Strategic Research and Analysis, Policy Sector.

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slowly, with most of the input coming from the legislative (and even judicial) branches, as well as from affected constituencies.

Third, the history of immigration stewardship in the United States fails to inspire confidence in the executive branch's ability to implement and manage a point system effectively. Canada and Australia both have rather smoothly running immigration bureaucracies that take a leadership role in setting immigration policy in their countries. By contrast, the INS has had an uneven record in setting immigration policy within the U.S. executive branch and a spotty record in performing its normal service and enforcement functions. Furthermore, the U.S. executive branch as a whole plays a relatively passive role on immigration issues. (The Clinton Administration's recent activism on *enforcement* matters should not be allowed to obscure its sorry record in influencing general immigration reform.) Instead, Congress has tended to dominate U.S. immigration policy-making (see Papademetriou 1994).

Under a point system, Congress would have to be willing to delegate many of the details to the executive branch, and the executive branch would have to take on significant responsibility for implementing and managing such a system. This could go against the prevailing trend toward less regulation of the U.S. labor market.

A point-like system places a great burden on the immigration agency. Done properly, it requires the creation of a data collection, analysis, and evaluation mechanism that allows policy-makers to determine whether the chosen categories are the right measures of economic growth and personal success, and whether the categories are weighted properly. Furthermore, the immigration agency would have to develop a more appropriate administrative infrastructure and a more open, cooperative institutional culture.

Despite these cautionary notes, the advantages of adopting a point-like system in the United States are clear and compelling. Such a system would shift the focus of economic-stream immigration from its present almost exclusive emphasis on "shortages" to one that takes much more account of the broader U.S. economic environment. Properly conceived and implemented, a point-like system would allow the U.S. government to do what it can be fairly good at, particularly when it does so in cooperation with the private sector (i.e., gauging the broad direction and needs of the economy over an intermediate- to long-range time horizon) rather than forcing it to do what it is least good at (i.e., performing burdensome and ultimately unsatisfactory case-by-case evaluations of whether a company needs a given immigrant for a particular job and whether minimally qualified U.S. workers are currently available for that job).

In the system we propose in the next chapter, we have adapted the point-system concept to fit the U.S. economic and cultural environment. By creating a prerequisite (in effect, an admission bar) that any point-system immigrant must first have a U.S. job offer, we ensure that businesses can continue to make their own judgments about their personnel needs. The new element is that we would restrict the pool of foreign workers from which businesses could draw to a global pool of very talented individuals who have characteristics—as determined by a point system—deemed to be consonant with long-term U.S. economic priorities.

4. REVISING ECONOMIC-STREAM SELECTION TO PROMOTE U.S. NATIONAL INTERESTS

In this chapter, we propose fundamental changes in the way we select most economic-stream immigrants and non-immigrants. The forty-year-old, shortage-anchored, case-by-case determination that underpins the current labor certification system may have been an appropriate job and wage protection mechanism for the unskilled and semi-skilled workers who dominated employment-based admissions in the 1950s and 1960s. However, as the analysis of the last two decades' economic and labor market changes in Chapter 1 makes clear, the system no longer adequately meets U.S. needs or interests. Our proposed reforms would generally shift the selection system's focus to one that chooses immigrants on the basis of their promise for long-term contributions to our economy. Employers would continue to make all selection decisions, but they would select from pools of individuals who can pass a threshold of requirements that include a points test. Employers would also be required to attest to certain recruitment, wage, and employment conditions. Numerical limitations would continue to be imposed, but a year's ceilings would be based on the previous year's usage.

The INS would be invested with authority to administer the admissions requirements more flexibly, while the DOL, which would see its labor certification and labor condition application functions eliminated, would benefit from a very substantial upgrading of its enforcement functions. Under the new framework proposed here, visa functions now administered by the Department of State's Bureau of Consular Affairs would gradually devolve to the Immigration Service. The proposed reforms would generally provide broader and more meaningful protections for U.S. workers, focusing primarily on wage requirements set differently than under the current system.

In the *non-permanent system*, most of the changes we propose focus on the H-1B category. Here, we propose adopting a modified version of the procedures and requirements we have developed for the permanent immigrant system. We argue for a lower point threshold than for the permanent system, as well as for consultations between the government and affected parties to clarify both the place of the H category in the employment priorities of U.S. firms and the category's truer effects on U.S. workers. We distinguish between workers who are more akin to "pre-immigrants" or "immigrants-in-waiting" and those who are filling fundamentally temporary needs. The former should come in under their own substream that would be acknowledged as a "holding tank" for prospective immigrants. The latter should be accommodated under a reconfigured H-2B category. "Pre-immigrants" can then be accumulating the experience and other attributes necessary for meeting the permanent system's requirements while employers can assess their attractiveness as permanent employees and, thus, permanent immigrants. (In both instances, as a protection for U.S. workers, a fundamental precondition should be that the employer's specific needs could not be met readily from within the U.S. labor market.)

The scheme we propose should be seen as a framework for a more systematic, thoughtful, and forward-looking approach to selecting permanent and non-permanent economic-stream immigrants. Although we suggest criteria that we believe should guide selection—and attach priorities and numerical values to them—our more important objective is to generate a dialogue about a more appropriate way of looking at our country's needs and priorities for the future, and the place that economic-stream immigration should play in promoting those interests. As our proposals become vetted, specific details may require reconsideration. We would welcome such adjustments. The end result of such a dialogue should be a more transparent and robust selection system that is flexible, has adequate self-regulating and enforcement features, is consistent with what our economy "values" and rewards, and thus is fully consonant with our country's long-term interests.

THE GOALS OF ECONOMIC-STREAM IMMIGRATION

Within some numerical parameters (see below), the U.S. economy should be able to access key talent wherever it is available, with procedures that are fully transparent and have predictable outcomes. Moss Kanter's "thinkers," "traders," and in certain narrow instances, "makers" (see Chapter 1) best represent the types of talented foreign-born workers that enhance the competitive positions of the firms that employ them and are most beneficial in the long run both to the broader economy and to their fellow employees. These are the workers whose immigration best serves the broadest possible set of U.S. goals and priorities, and one goal of immigration reform should be to attract and accommodate more of them.

Conversely, in all but the most exceptional circumstances, there is no reason to admit unskilled or semi-skilled workers under our permanent economic-stream immigration system. Furthermore, many skilled workers should also find it more difficult to immigrate to the United States. For example, we do not need to admit as permanent members of the U.S. labor force people such as rote computer programmers who, while possessing specific and highly technical skills, may have few of the other characteristics that are crucial for long-term success in the labor market.

Finally, any reforms should enhance the prospects of success for U.S. employers and workers alike and should strive to achieve greater consistency among policy intent, legislative language, regulations, and enforcement. In fact, reforms should help cultivate the perception that the basic "stewardship" issues associated with more effective management of all U.S. immigration laws are being addressed.

Specifically, reforms must emphasize the search for: (a) the right mix of incentives and disincentives for businesses to play by the rules yet succeed in international competition; (b) a more realistic—and ultimately more effective—understanding of what constitutes U.S. worker "protection" in the context of immigration and how best to advance it; (c) a new habit of cooperation between regulators and the regulated that could serve as a "partnership" model for other contentious policy areas; and (d) a new resolve to identify, isolate, and punish corporate citizens who habitually violate U.S. immigration laws.

We believe that the following general propositions should guide the reform effort:

General Proposition 1: Most economic-stream *immigrants* should continue to be selected by employers on the basis of their expected contributions to that employer. However, they should be selected from a pool of individuals who possess characteristics that enhance the prospects that they will also make substantial long-term contributions to the economic strength of the United States.

General Proposition 2: Most economic *non-immigrants* should be admitted: (a) to fill a specific labor need for a temporary period; (b) to discharge our international obligations under a variety of trade, investment, and cultural exchange regimes; (c) to facilitate international commerce and trade; or (d) to enhance the cultural and artistic life of the United States. In addition, some economic non-immigrants should be selected from a pool of individuals who possess characteristics similar to those suggested for permanent immigrants and who are likely to make long-term contributions to the economic vitality of the United States.

In addition to these general propositions, certain administrative and programmatic guidelines are necessary to help the United States select economic immigrants and non-immigrants efficiently. The following should be part of any new immigration system:

Guideline 1: The selection process should be efficient, timely, fair and transparent for all parties.

Guideline 2: Enforcement, including post-entry enforcement, should become a credible deterrent against fraud and abuse.

Guideline 3: The selection system should be constantly reviewed and adjusted to make sure it continues to serve the country's changing economic and labor market needs.

Guideline 4: Priority should be given to accurate data collection and reporting, which are critical to monitoring and evaluating the impact of any new selection system.

RECOMMENDATIONS REGARDING IMMIGRANTS

We propose dividing economic-stream immigration into three tiers. The top tier would be similar to the current EB-1 immigrant visa category. The second tier, where the bulk of our proposed changes apply, would include an employer sponsorship requirement, a work experience requirement, wage and other attestations, and several selection criteria against which candidates would be "tested." The third tier would be for investors. (See table **4-1**.)

4-1. Proposed Immigrant Visa Categories for Economic-Stream Immigrants

Category/Name	Requirements/Description	
First Tier (Truly Outstanding)	Equivalent to current EB-1 category 3 subcategories: • Individuals with extraordinary ability • Certain outstanding professors and researchers • Certain multinational executives and managers	
Second Tier (Selection Criteria Immigrants)	Employer Requirements • Sponsorship • Attestation as to total compensation package	Immigrant Requirements • 3 yrs. specific work experience • Receive at least 15 of 23 points (see Table 4-2, p.154)
Third Tier (Immigrant Investors)	• Must invest at least $750,000 • Must create or save at least 3 jobs for U.S. workers	

The system we propose would replace the labor certification function currently used for admitting most immigrants in the employment-based second and third preference categories. We recommend abolishing this function because its emphasis on "shortages" is no longer an appropriate framework for the affirmative immigration policies that undergird successful global economies. Despite endless attempts at "correction," it continues to be unable to work as intended, is riddled with delays that make a mockery of its stated intentions and, as discussed at length in Chapter 3, provides virtually no protection for U.S. workers.

In addition, the labor certification system focuses on only a short-term goal: the immediate needs of the labor market. Immigrants are *permanent* additions to the labor force. It makes little sense to admit them (using labor certification or any similar system) *solely* on the basis of a specific job opening that may quickly become redundant or for a function that may offer few long-term benefits for either the employer or the country. Instead, a key goal of the economic immigrant selection system should be to satisfy ourselves that those who are admitted into the United States as presumptive members of our society have a proper mix of skills and other attributes, such as experience, education, and language, that maximizes the probability of long-term success in the labor force. Even if it worked perfectly, the existing labor certification process would have no more than a haphazard relationship to that goal.

Abolishing the labor certification process and replacing it with three modest prerequisites and a system that selects immigrants partly on the basis of valuable personal characteristics would achieve several additional benefits: First, it would save significant resources.[92] Second, it would protect U.S. workers through the imposition of work experience and realistic requirements, thus limiting competition for entry-level jobs and eliminating any preference for immigrant workers because they are cheaper. Third, our proposal would institute a simpler, less intrusive, and less costly process for obtaining immigrant status through employer sponsorship and would allow foreign workers more room to negotiate on stronger terms with more than one employer and greater independence to decide what is in their best interest. (This will help to eliminate some of the power inequalities between employers and foreign workers that tend to exacerbate the adverse effects that their recruitment and employment sometimes have on the wages and working conditions of U.S. workers.) Finally, and perhaps most significantly, the flexible selection criteria system we propose below could be easily adjusted to changing economic and labor market conditions.

FIRST-TIER IMMIGRANTS (THE TRULY OUTSTANDING)

The top tier of the new economic immigrant visa system would be similar to the current EB-1 immigrant visa category for "priority workers." Foreign nationals with extraordinary ability presumptively enhance the economic strength of the United States. So do outstanding professors and researchers.[93] And foreign executives and managers who currently meet the EB-1-3 subcategory's requirements clearly facilitate international trade with the United States.

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[92] The DOL would save an estimated $59 million a year presently spent on labor certification. In addition, we estimate that employers would save between $135 and $270 million per year by eliminating the labor certification process. The latter set of figures is derived from the following assumptions. First, we assume that a typical labor certification application costs an employer $2,500 to $5,000 in legal fees alone (few employers attempt the labor certification process without the aid of an attorney). Second, we assume that between educating themselves about the labor certification process, drafting labor certification applications, justifying the job's minimum requirements to their outside lawyers and the state and federal Labor Departments, reviewing the applications of and interviewing any U.S. workers who apply in response to the labor certification ad, preparing a recruitment summary to send to the DOL, and rebutting any Notices of Findings issued by the DOL, the value of time spent by companies is equivalent to the amount spent on legal fees: $2,500 to $5,000. The total of $5,000 per application ($2,500 in attorney's fees plus $2,500 in company time) is then multiplied by 27,000 labor certification applications filed in FY1994, yielding a total of $135 million. At the high end of potential costs ($5,000 in attorney's fees plus $5,000 in lost time), our calculations yield $270 million in current costs that could be saved by eliminating the labor certification process.

SECOND-TIER IMMIGRANTS

The shortcomings of the current immigration system are clearest with regard to the second-tier economic-stream, and this is where we propose to make the most changes.

PREREQUISITES

To qualify for our proposed second-tier economic-stream immigrant visa category, foreign nationals would have to satisfy three prerequisites. First, they must have a job offer from a U.S. employer. Second, they must have at least three years' work experience in the specific occupation for which they are being sponsored. Third, the sponsoring employer must make certain attestations, including a commitment to pay them the higher of (a) the actual wage the employer pays to other similarly qualified and employed individuals, or (b) the prevailing wage rate for the occupation in the area of employment. Individuals who satisfy these prerequisites would also need to qualify under a selection formula that awards value points for certain human capital attributes.

Employer Sponsorship Requirement. Requiring immigrants in the second tier to have a job offer before coming to the United States will ensure that a U.S. employer will be at the controls of both timetable and process, and that the selected immigrant will be working as soon as he or she enters the United States. This will give immigrants immediate access to economic opportunity, allowing them to make a more complete transition into U.S. society. A job offer is the best single assurance that an economic need is being met (an imperfect yet credible substitute for a demand-and-supply test) and that economic-stream immigration occurs in an orderly fashion. Together with the selection criteria suggested below, employer sponsorship helps assure the immigrant's immediate contribution to the United States.

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[93] As we implied in Chapter 2, the INS should periodically review the admissions data and adjust its regulations to ensure that those entering under this category are truly outstanding.

More important, requiring employer sponsorship adds another level of screening to a selection process that costs the government nothing. Before an immigrant qualifies under the second tier of our proposed system, an employer will have had to review and approve his or her credentials, inter-personal and communications skills, and likelihood of career success. Furthermore, by the time the employer begins the actual visa petitioning process, the firm will already have decided that the prospective immigrant is essential to its business and will have made a preliminary judgment that he or she will be able to meet the screening criteria for admission. The fact that the foreign worker meets the program's other selection criteria means that he or she will also have the tools to make a long-term contribution to the broader economy.

Experience Requirement. As a rule, experienced workers make a more immediate contribution to their employer and to the broader economy than do inexperienced workers. Furthermore, admitting inexperienced economic-stream immigrants to the United States could create unnecessary competition for U.S. workers vying for entry-level positions. Therefore, we propose that an individual must have at least three years[94] of prior work experience in the specific field and subfield for which an employer is recruiting to be eligible for second-tier immigrant status.

Attestation Requirements. We propose that sponsoring employers fulfill a three-part attestation requirement for second-tier economic-stream immigrants: (a) a wage attestation; (b) a no strike or lockout attestation; and (c) a notice requirement.

Wage attestation. Employers sponsoring a second-tier immigrant would be required to attest that they will pay the foreign worker the higher of (a) the actual wage the employer pays other individuals who are similarly employed with similar qualifications or (b) the prevailing wage rate for the occupation in the area of employment. Our emphasis on an objective and reliable wage attestation requirement stems from our conviction that nothing in the permanent or non-permanent U.S. economic-stream selection system should encourage employers to "prefer" hiring foreign workers simply because they are cheaper. Doing so amounts to a governmental subsidy that hurts U.S. workers. As noted in Chapter 3, determination of wages has been the Achilles heel in the entire attestation mechanism devised by the 1990 Immigration Act. At particular issue has been not only the haphazard way in which most wage surveys are conducted by the government but also the lack of guidelines on what constitutes an acceptable survey methodology by an employer. The recommendations that follow address both issues.

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[94] We recommend that three years of part-time work at an academic institution, such as doing research or being a teaching assistant for courses, should count as the equivalent of one year of specialized work experience.

Instead of continuing with the vagaries of state employment security agency (SESA) determinations, we recommend establishing a process that develops reliable prevailing wage information from non-governmental, industry-specific sources. The actual wage would be defined as the *total compensation* received by comparable U.S. workers, including all benefits, bonuses, and in-kind assistance, and excluding such items as the cost for bringing a foreign worker to the United States, which should properly be paid by the employer. Such non-governmental surveys could be national, regional, or local in scope. They might tie wage levels to specific skill levels. They might establish salary ranges. We propose that the DOL set the methodology and standards for such surveys, following consultations with those who conduct salary surveys for professional associations, private sector wage survey firms, the Bureau of Labor Statistics (which periodically engages in such surveys), and the affected constituencies. Just as there are generally accepted accounting standards, so too we could develop generally accepted wage-survey standards. Such surveys will have many more uses than one may imagine at this time, and they would permit federal and state governments to shed an unwanted burden in which they have developed an unenviable record of failure. It would save money and reduce government bureaucracy at the same time. And if the result of increasing reliance on such surveys should become the impetus for a "new" service industry, so much the better for everyone involved.

As long as prevailing wage surveys follow generally accepted survey methodology standards, employers can rely on them to make sure they are paying the prevailing wage. In the event of a dispute, a rule of reason should apply—i.e., whether the source data are reasonable and consistent with industry standards.

No strike or lockout attestation: We also believe that employers should attest that there is no strike or lockout at the place of employment. An employer would not be able to petition for a second-tier, economic-stream immigrant to replace a U.S. worker who is on strike. We also propose that when employers petition for a second-tier immigrant to replace a U.S. worker who has been laid off, the employer should expect a higher level of scrutiny by the government to assure that the two acts were not improperly related and that laid-off U.S. workers would have adequate and preferential re-employment opportunities.

The DOL has long sought a "no layoff" requirement as part of the H-1B attestation process. We understand the merits of the agency's argument. But we also see significant problems. A "no layoff" provision makes more sense in a traditional employment context than it does in the flexible staffing context so common today. Furthermore, we do not want to force employers to continue to employ unproductive employees in order to have access to immigrants because of a "no layoff" requirement. The thrust of this entire study is to create a level playing field between U.S. and foreign workers, not to give either side an advantage over the other that may have adverse economic consequences for a firm. If an employer selects a foreign worker strictly on his or her merits, and our proposed selection criteria and other safeguards are in force, that should be enough protection for U.S. workers. Thus, the DOL should use any authority it is given to investigate alleged violations of any "no-layoff" provisions very sparingly and sensitively.

Notice-of-filing attestation. Finally, we propose that employers should also attest that they have given their employees notice of the filing of the attestation, both by posting the attestation at the worksite and by giving notice to the union or professional association representative, if there is one. Such a notice requirement gives U.S. workers an opportunity to participate in the process, and to file a complaint if they believe the employer is violating the law.

Satisfying the attestation requirements. Employers would have two ways to satisfy our proposed attestation requirements: (a) prequalification or (b) case-by-case. To prequalify, employers would have to document that their recruitment, compensation, and employment policies are within a band of "acceptable" business norms, for example, in the way they advertise for, recruit, interview, and select employees. A company requesting attestation prequalification would have to show that it has a formal company-wide compensation and employment policy that is communicated to all employees and that covers such standard issues as salary increases, bonuses, benefits, and job classifications. The company's compensation system would have to rely on market data to set wage and benefit levels. Other factors that might be considered for the prequalification component include whether the company has a human resources or personnel department to administer its compensation system, has established documentation for job categories, and routinely relies on up-to-date national or area salary surveys to establish wage levels.

Companies that meet these eligibility requirements would be prequalified as meeting the attestation requirements for second-tier purposes for two years, renewable in two-year increments upon resubmitting relevant information. During this period, the employer would simply file second-tier immigrant visa petitions, with copies of the posted attestation and the blanket approval, with the INS. The employer would also send the DOL a copy of the attestation for audit and investigation purposes. We intend for prequalification to raise a rebuttable presumption that the employer is complying with the attestation requirements. The DOL should be able to investigate alleged violations by such employers only if it receives credible allegations of fraud or other serious violations.

Not all companies would be eligible to prequalify for the second-tier attestation requirements, even if they establish that they have excellent recruitment, compensation, and employment policies. For example, Congress might consider withholding the prequalification benefit from firms: (a) that file more than a certain number of immigrant visa petitions per year; (b) whose foreign national workforce exceeds a certain percentage of the total workforce in the company; or (c) that have been found in violation of any immigration law within a specified period.

Companies that do not meet the prequalification requirements for second-tier attestation purposes, or that do not want to use the prequalification alternative for any reason, would continue to file individual attestations. Such individual attestations would be filed with the INS rather than with the DOL, although a copy would be sent to the DOL for audit and investigation purposes. Evidence to show compliance with the prevailing wage attestation condition could consist of a copy of the survey or other reliable data on which the prevailing wage is based. Evidence of the actual wage could be documented by a copy of the job posting showing the salary offered and a summary of what other workers in the same position earn. Employers would not be required, however, to document their entire wage system.

Enforcing Compliance. We recognize that shifting to an attestation process to ensure compliance with our proposed system raises basic questions of enforceability. As a result, we recommend enhancing enforceability by requiring employers to maintain an adequate "paper trail" for audit and enforcement purposes should they later come under scrutiny or investigation. For instance, employers should be required to keep a record of their sources for prevailing wage information, adequate payroll records to determine the actual wage paid, records of what steps they took to recruit U.S. workers, copies of W-2s or other payroll information, etc. Considering that most of the firms that are likely to use our proposed second-tier immigrant system will be well-organized firms with clearly articulated personnel policies and well-staffed human resources departments, the requirements we recommend are far less intrusive and unusual—or costly—than one might think. The increasing reliance on electronic systems means that personnel files can easily be programmed to include the information required under our proposals.

Moreover, the attestations themselves should be kept by the INS and the DOL in a computer database, so that any interested person or entity could readily access non-proprietary data, properly protected for privacy, in a usable format. Complaints about any aspect of the attestation process should be received and acted upon on an anonymous basis. Our concept is to repose a greater degree of trust in the employer at the inception of the process, but not to let the employer off the hook. Those who betray that trust should pay a heavy price in terms of fines, debarment from immigration programs for specified periods, and even criminal prosecutions in appropriate cases.

SELECTION CRITERIA

Employer sponsorship, previous work experience, and attestations are the prerequisites that employers and prospective immigrants must meet if they are to be eligible to file an immigrant visa petition under our proposed second tier. To actually *obtain* a second-tier immigrant visa, however, the pre-selected immigrant must also have personal characteristics that are essential to making a sustained and substantial contribution to the United States. These characteristics are as follows:

- The language ability and communications skills necessary to interact effectively with colleagues and customers;

- An educational background that has instilled both specific knowledge or technical skills *and* a facility for abstract thinking;
- A demonstrated commitment to improving one's own human capital endowments;
- A familiarity with U.S. culture and economic institutions adequate to allow one to adapt to dramatic labor market changes over his or her career; and
- An age that permits one to make a long-term substantial contribution to one's adopted country before retirement.

Table **4-2** outlines our proposals for selection criteria, with suggested numerical weights. However, considering the rate at which economic conditions change, we believe that it makes little sense to legislate these factors. Congress moves too slowly for it to enact detailed changes on immigration, particularly on the controversial and highly complex topic of economic-stream immigration. Just as we want the economic immigrants we choose to be able to adapt, so too we need flexibility in our selection system. Hence, immigration officials should be given authority to change both the criteria for selecting economic immigrants and the number of points needed to qualify periodically, as economic conditions change. Such flexibility is essential for our system's success. Moreover, Congress' need to stay engaged can be discharged relatively easily by requiring that proposed changes be vetted in advance with the two subcommittees charged with overseeing immigration.

Our proposed selection criteria system is superior to the current system for a number of reasons. First, it better accords with the policy goal of maximizing the probability of long-term economic contributions and success in the labor force.

Second, it better satisfies the programmatic objective that the immigrant selection process should be efficient, timely, fair, and transparent for all parties. Our proposed selection criteria system would create far less bureaucracy than the current system. Instead of having to deal with the complex labor certification system, employers could quickly evaluate prospective foreign-born employees to see whether they are likely to qualify under the proposed point system. Once that pre-sorting is done, there would be no other significant pre-entry hurdles to cross other than those associated with administrative reviews of a prospective immigrant's qualifications and the normal security and

4-2. Proposed Selection Criteria System (Second-Tier Immigrants and H-1 Non-immigrants Only)

Factor	Criteria	Points	Max
Education	High School	1	7
	Some College	2	
	Bachelor's Degree	4	
	Master's/MBA/JD	6	
	PhD/MD	7	
	Completion of Apprenticeship/Vocational Program, plus five years' post-vocational program experience[a]	5	
	Master Craftsperson/Teacher of Trainers[a]	1	
Age	<25	1	3
	25 to 50	3	
	>50	1	
Language[b]	Functional English	3	8
	Fluent English	5	
	Fluency in a third language other than English or native language	3	
Adaptability	Has previously worked or studied for a substantial period of time in the U.S. or another foreign country	2	5
	Has taken advantage of opportunities for personal or professional development, including language classes, or completed on-the-job or other training, as evidenced by a certificate of completion	1	

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	Has taken a leadership role in teamwork arrangements, as evidenced by an affidavit from employer or supervisor	1	
	Has worked in a multi-country team setting before, as evidenced by an affidavit from employer or supervisor	1	
Total Maximum Points:		**23**	
Proposed Pass Mark Number for Second-Tier Immigrants:		**15**	
Proposed Pass Mark Number for H-1 Non-Immigrants:		**12**	

[a] Formal training through rigorous apprenticeship programs, like the ones many skilled workers receive in other advanced industrial nations, is invaluable for learning skills and preparing for occupations in which recurring spot shortages exist in the United States. We propose that such an apprenticeship be combined with at least five years' experience working in progressively more responsible positions following the apprenticeship. An additional point would be accorded to master craftsmen who, in addition to their own economic contributions, can help train U.S. workers in their craft. Alternatively, if a labor union and an employer jointly petition for such an individual, it should be considered prima facie evidence that allowing such a person into the United States meets a labor market need, has no adverse effects on U.S. workers, and serves broader economic interests. In such instances, the selection criteria should be waivable on a case-by-case basis. A citizen advisory board impaneled by the INS to assist it in making these and similar discretionary decisions would introduce both rigor and predictability into such decisions while reassuring potential critics that the process is being adhered to.

[b] Prospective immigrants who present evidence that they have at least a three-year college degree and that the principal language of instruction for that degree was English would automatically receive the maximum number of points (5) for this factor. All other second-tier economic-stream immigrants would be required to take a standardized test of English proficiency, such as the Test of English for International Communication (TOEIC) administered by the Educational Testing Service (ETS).

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excludability[95] screens. Immigrating under our proposed selection criteria system would also be quicker than under the current system. A foreign worker should be able to immigrate to the United States under our system in a few months.

It is up to Congress to engage the appropriate actors in a dialogue about the precise number of points to be initially accorded to each factor, and the minimum number of points that should qualify an immigrant under the system (see box **4-3**). We believe, however, that the following factors are critical to making a sustained economic contribution to the United States, and therefore should be included in any selection criteria system. Our selection criteria scheme, based on the following factors, would have a maximum of 23 points and a pass mark of 15 points. As the INS accumulates experience with the system over time, it may want to consider a larger range to be able to make finer distinctions within factors or to change weights among factors.

Education. Education, including formal training through rigorous apprenticeship programs, is a key indicator of the potential for making a sustained and substantial contribution to the U.S. economy and a key measure of adaptability. A good, well-rounded education helps people develop problem-solving skills that will help them throughout their working lives, no matter how many times they change jobs or duties. It is the critical variable in the preparation of successful "thinkers," "traders," and in many instances, "makers"—i.e., those workers who will help their firms succeed in the competitive global economy.

Education is the strongest predictor of economic success. For example, in 1990, U.S. workers with professional degrees earned an average of $59,500 per year, while high school dropouts earned an average of just one-tenth of that, or $5,900 annually (Kominski and Sutterlin 1992:14). Moreover, the pay differential between college graduates and others is widening. Education will become even more important for success in the workforce in the future. The DOL estimates that the number of jobs requiring at

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[95] Section 212(a) of the INA prohibits any foreign national from being admitted to the United States or remaining here if he or she is determined to be excludable (also known as inadmissible). INA §212(a) contains nine categories of exclusion grounds including: health-related grounds; criminal and related grounds; national security grounds; public charge grounds; prior immigration violations grounds; and documentation requirement grounds. Each category except that for public charge grounds, contains several subcategories.

4-3. BUILDING FLEXIBILITY INTO THE IMMIGRANT SELECTION PROCESS

No selection system can anticipate correctly all situations. Our proposed system may prove too burdensome for some categories of people, such as artists and entertainers who do not meet our criteria for "extraordinary ability" but may still be very talented. Similarly, workers such as physical therapists are not likely to meet the proposed pass mark under our selection system. Yet there is a clear demand for physical therapists in the United States, as evidenced by the occupation's inclusion in the DOL's Schedule A, which does not require a labor certification before one applies for an immigrant visa. For these reasons, Congress must build flexibility into the system, and the INS must show a willingness to exercise such flexibility responsibly and in creative ways.

One possible way to demonstrate such flexibility might be to allow prospective employers of foreign nationals in certain occupations who are just one or two points shy of the pass mark to submit evidence why the individual should nevertheless be allowed to immigrate. In compelling cases or very unusual circumstances, the INS should approve such requests. Alternatively, the INS might use a variation of the current "national interest waiver" test to determine whether foreign nationals in certain occupations who are just one or two points shy of the pass mark might nonetheless qualify as second-tier immigrants. Under this test, currently used in some EB-2 cases to avoid the normal labor certification requirement, the INS applies flexible factors to decide whether an individual's admission is in the national interest. In both cases, specially appointed *citizen advisory boards* might be relied upon to assist the INS in making such decisions. A final, and in many instances preferable, option would be to experiment with requirements that would restrict foreign workers in most of the occupations that require some training (yet experience sustained worker shortfalls) to only temporary entry (see discussion on H-2B below). Such experimentation would put employers of such professionals on notice that their access to *permanent* foreign workers is effectively over and that they should begin to make the necessary training plans to develop a U.S. workforce in those professions.

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4-4. CASE EXAMPLE: DONNA FROM DJIBOUTI

Donna received a Ph.D. in comparative languages three years ago. Since that time, she has been teaching as an assistant professor of Arabic at a U.S. college. The college now wants to sponsor her for an immigrant visa. Assume she does not meet the criteria to qualify as an outstanding professor in our proposed first tier. Donna is 29 years old, and speaks fluent English, Arabic, and French.

Education:	7
Age:	3
English language:	5
Extra points for knowing third language:	3
Adaptability (no. 1):	2
Total:	20 (passes)

least a bachelor's degree will expand by about 40 percent by 2005, while jobs that do not require a college education will grow by only 17 percent during the same period (DOL 1994:28).[96]

Age. Other things being equal, younger workers will have more time to make a contribution to the U.S. economy than will older workers. However, young workers with little or no experience will make a smaller immediate contribution than more experienced workers, while also competing for entry-level positions with new or recent U.S. college graduates. The economic immigrant selection formula should take these facts into account.

We should not, however, make preemptive judgments about the age at which a prospective immigrant will make his or her most significant contribution to the U.S. economy. A corporation may need to bring in an experienced manager from a foreign affil-

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[96] College-educated workers constitute only one-fourth of the U.S. workforce (Mishel and Bernstein 1993:141).

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4-5. CASE EXAMPLE: ALICE FROM AUSTRALIA

Alice graduated three years ago from a U.S. college with a B.A. degree in computer science. She is now 25 years old. Since graduation, she has been working on an H-1 visa for a large U.S. computer software company, where she has received on-the-job training, become a leader on her software team, and has worked in a multi-country setting modifying software for export to Australia and other countries.

Education:	4
Age:	3
Language:	5
Adaptability (nos. 1-4):	5
Total:	17 (passes)

iate. A magazine may want to hire a well-respected graphic designer who has 30 years of experience overseas. A computer firm may want to employ a young prodigy. For these reasons, we propose that potential immigrants receive a small but set number of points if they are between the ages of 25 and 50. Older and younger people would receive only one point for age, but could still qualify under the selection criteria system if they otherwise meet the cut-off mark.

Language. A person cannot succeed in today's labor market without being able to conceptualize and communicate in English effectively. Employers know this and would be unlikely to hire someone permanently who is unable to communicate effectively in English. Thus, assessing a prospective immigrant's ability to speak English must not become a bureaucratic morass. We propose that second-tier economic-stream immigrants who present evidence that they have at least a college degree for which the principal language of instruction was English would automatically receive the maximum number of points awarded for the language factor, as they do in Australia. All other second-tier economic-

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4-6. CASE EXAMPLE: KURT FROM GERMANY

Kurt is a master craftsman in machine tool die manufacturing. He is 30 years old, and has six years of experience. A U.S. company wants to hire him to teach U.S. workers his unique skill. The relevant U.S. labor union agrees there is a shortage of U.S. workers in the area with Kurt's skills, and has no objection to his entering the United States. Kurt has a functional but not fluent command of English.

Master craftsman:	6
Age:	3
Language:	3
Adaptability (no. 2):	1[a]
Total	13 (fails)

Comments: Additional training in English will allow Kurt to meet the 15 point pass mark for second-tier immigrant status. Alternatively, a "no objection" letter from the plant's union representative allows the INS to waive the selection criteria formula and admit Kurt.

[a] Kurt's completion of extra training to become a master craftsman is evidence of this adaptability factor.

stream immigrants would be required to take a standardized test of English proficiency. The most appropriate test may be the Test of English for International Communication (TOEIC), which is administered by the Educational Testing Service (ETS).[97]

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[97] The ETS also administers the Test of English as a Foreign Language (TOEFL) and the Test of Spoken English (TSE). The TOEFL may not be adequate for our purposes, since it does not fully test individuals' ability to speak and conceptualize in English. People who take the TSE record their answers to selected questions on a tape cassette, which is sent to ETS and independently rated by two professional examiners. The examinees are graded on overall comprehension, pronunciation, grammar, and fluency. The TSE is not, however, targeted to general business usage or to any particular discipline.

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The TOEIC tests on-the-job use of English in a variety of job-related settings, such as the ability to understand a business-related conversation and to read English-language manuals, technical books, and correspondence. It is taken by over 700,000 people annually. Many foreign companies and governments use the test to assess how well their current employees understand English, to hire new employees, and to track the progress of their employees in English-language training programs. A standardized test like the TOEIC eliminates the need for personal interviews of prospective immigrants to directly assess their language proficiency and also eliminates the subjective measurement problems associated with interviewing. Points could be awarded on the basis of TOEIC score ranges. For example, an immigrant who receives a TOEIC score of between 400 and 590 might get three points under our proposed scale. Applicants who score between 590 and 730 might receive four points, and individuals who score above 730 on the TOEIC might receive five points.[98]

We also propose awarding extra points to individuals who are fluent in a language other than their native language and English. Knowledge of three languages makes a person more likely to succeed in the labor force and to make a more significant contribution to the U.S. economy, especially in the growing international marketplace.[99]

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[98] According to the ETS, the TOEIC is both statistically valid and reliable in measuring candidates' language abilities in English. The test is scaled from 0 to 990. A score of 300 to 500 means the speaker has a functional but limited proficiency in English and is able to maintain very simple face-to-face conversations on familiar topics. A score of 500 to 590 is defined as an "advanced" level in English, meaning the person can initiate and maintain predictable face-to-face conversations and satisfy limited social demands. A score of 590 to 730 means the individual has a "working proficiency" in English, in that he or she is able to satisfy most social demands and limited work requirements. A score of 730 to 875 indicates the person is "proficient" in English, meaning that he or she can satisfy most work requirements with language that is often but not always acceptable and effective. Finally, a score of 875 to 990 means the person is "professionally proficient" in English, in that he or she can communicate effectively in any situation. Non-management personnel average about 550 on the TOEIC test, according to the ETS. The average for supervisory personnel is about 680.

[99] A standardized test like the TOEIC does not exist for many other languages. Moreover, trying to compare language test results systematically across languages is difficult. The Association of Language Testers in Europe (ALTE) is establishing common standards for language testing in Europe. So far ALTE members have placed language tests for eight languages into a common framework for comparison purposes: Catalán, Danish, English, French, German, Italian, Portuguese, and Spanish. There are three levels in the ALTE framework: waystage user, threshold user, and independent user. Other language tests given by ALTE members are at a higher level and have not yet been added to the ALTE framework. The ALTE framework is a promising beginning to standardize and compare knowledge of a third language for immigration purposes.

Adaptability. Since the ability to adapt to changing economic and labor market conditions is particularly important in a rapidly changing economy, workers who can adapt quickly to changing conditions in the U.S. labor market are crucial to the U.S. economy's ability to continue to grow and expand. One of the inherent weaknesses in the point systems of Canada and Australia is the difficulty in identifying proxies for adaptability. Objective characteristics such as education, language, age, and experience are important in determining a person's potential for making a significant economic contribution and for his or her own economic success. However, these factors are useful only in conjunction with other, less tangible qualities that allow an individual to use them to full advantage. Intangible qualities such as motivation, adaptability, resourcefulness, personal management skills, teamwork skills, and the ability to learn in different situations are all crucial in determining long-term economic contributions and personal success.

The often subjective nature of these factors makes them hard to assess without creating what our proposal seeks to avoid: a bureaucratic, resource-intensive, fraud-prone, and ultimately unsatisfactory process. Nevertheless, some objective proxy variables can be developed. For example, prospective second-tier immigrants might be assessed on the following: (a) prior work experience or study for a substantial period of time in the United States or another country other than their own; (b) prior personal or professional development or on-the-job or other training, including language courses, as evidenced by a certificate of completion;[100] (c) a leadership role in teamwork arrangements; and/or (d) prior work in a multi-country team setting. Applicants would receive one or two points for each of the criteria for which they could provide evidence.

PROCEDURAL ASPECTS

Once Congress has set the general factors and parameters for the selection formula, the INS would implement regulations detailing the eligibility requirements and threshold cut-off point for the first year.[101] Employers reviewing those requirements would make pre-

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[100] About 25 percent of U.S. workers receive training sometime in their careers, either to find a job, improve job skills, or to learn a new job (Kominski and Sutterlin 1992:1). That figure is likely to rise at a robust pace with the continuing restructuring of the U.S. economy.

[101] Congress may want to set thresholds for the first year itself. Allowing the INS to do so, however, would establish the critical principle that these judgments should be made administratively.

4-7. CASE EXAMPLE: ISTVAN FROM HUNGARY

Istvan, 25 years old, is a computer science wizard who came to the United States three years ago on a tourist visa. He was so impressed by the entrepreneurial spirit in the United States that he has stayed ever since. For that reason, he did not complete his bachelor's degree in Hungary. During his stay in the United States, Istvan has established and built up a successful computer software company. He now employs 15 workers, and his company makes $100,000 in profits each year. He speaks functional but not fluent English. Because he has been so busy running his company, Istvan's only "training" since his arrival in the United States is a self-help course he attended that was given by Anthony Robbins. Istvan now wants to legalize his status by getting a green card.

Education:	2
Age:	3
English language:	3
Adaptability (nos. 2, 3):	2[a]
Total:	10 (fails)

Comments: Istvan lacks extraordinary ability for the first-tier immigrant visa category, and does not have enough points for the second-tier selection criteria system. Istvan conceivably could qualify in the third tier as an immigrant investor, assuming he invests an additional $750,000 to expand his growing business and creates jobs for an additional three U.S. workers. In any event, and the issue of Istvan's illegal overstay aside, unless Congress chooses to reward entrepreneurial spirit and inventiveness separately during the vetting of a system such as the one proposed here, Istvan cannot receive an immigrant visa under our second-tier selection formula.

[a] Istvan will receive one adaptability point for his leadership role in starting and running his company. The second adaptability point assumes that the Anthony Robbins self-help course that Istvan took qualifies as personal or professional development.

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liminary assessments of potential foreign nationals they want to sponsor for an immigrant visa. They would then submit a petition and attestation form to an INS regional processing center, setting forth documentation about the requisite job offer, the person's work experience, the wages the person would be paid, and the other attestation elements. Employers would also include documentation on how the potential immigrant meets the selection criteria system threshold. The INS would make an independent determination of whether the individual qualifies under the selection criteria system and conduct the necessary background check to make sure that he or she is not excludable. If the person is already in the United States, as most are, he or she could adjust status at an INS office. If the potential immigrant is outside the United States, a specially trained INS officer would issue the immigrant visa at a consular post overseas. This proposed shift of responsibilities from consular officials to a new cadre of specially trained INS officers stems from our view that the added responsibilities we are assigning to the INS imply both a fundamental rethinking of that agency's functions and organizational structure *and* a similar rethinking of how the various immigration functions are distributed within the federal bureaucracy (see also the discussion below).

THIRD-TIER IMMIGRANTS (INVESTORS)

This tier would be reserved for investors. Investors comport with our first general proposition because they enhance the economic well-being of the United States through their capital investments in this country. However, the current requirements for EB-5 status (see Chapter 2) are too onerous and restrictive, as evidenced by the fact that only 157 EB-5 principal immigrants were admitted in FY1994 and only 180 in FY1995.

A major impediment to potential immigrant investors is the requirement that their investment create or save at least ten jobs for U.S. workers over a two-year period. No businessperson can know for sure whether an investment will work out, and whether it will create a significant number of jobs. Indeed, many successful domestic investments of that size in the United States create far fewer than ten jobs. Congress created the ten-jobs requirement basically as an afterthought and out of thin air, as a political fig leaf to hide the category's true intention, which was to attract wealthy foreign investors (particularly from Hong Kong) who, in the late 1980s, had been flocking to Canada and Australia under those countries' more flexible investor categories. The ten-jobs requirement also tends to direct investments toward labor-intensive industries (such as the restaurant or hotel sectors), which employ primarily low-wage, low-skill workers.

Congress should liberalize the requirement for immigrant investor classification. For example, instead of focusing on the *number* of jobs created or saved, we might consider the *quality* of the jobs created or saved in evaluating an immigrant investor's contribution to the U.S. economy.

Another component of the current immigrant investor program that may require rethinking is the requirement that investors show they have continued to meet the statutory criteria (including creation/saving of the required number of jobs and maintenance of the requisite amount of capital investment) for two years. Foreign investors who do not substantially comply with those requirements lose their status and can be placed into deportation proceedings. These are big risks for any investor, especially in uncertain economic times, and probably deter many people from applying for immigrant investor status.

Another issue with the current immigrant investor program that may require rethinking concerns the INS' documentation requirements. Prospective applicants must file their personal tax returns showing their worldwide income for the last five years, and they must submit evidence of any civil or criminal judgments or pending proceedings filed against them anywhere in the world within the last 15 years. While guided by proper concerns, these requirements may deter legitimate business people who do not want to reveal details about all their financial affairs.

In effect, the statute and implementing regulations have turned the immigrant investor category into a completely unsuccessful program. The program's onerous requirements virtually assure that many of the few people who do pursue the visa may in fact be doing so simply as the price for obtaining a green card, rather than as an investment opportunity that carries the secondary benefit of a U.S. immigrant visa.

The issue is: Do we want a successful immigrant investor program? If so, we need to be vigilant without imposing unduly burdensome requirements. We recommend that Congress amend the immigrant investor program by, among other things: (a) reducing

4-8. CASE EXAMPLE: GILBERT FROM CANADA

Scenario I: Gilbert is a promising goalie on the Boston Bruins' Canadian farm team. Gilbert is 22 years old and speaks only passable English, because he grew up in Quebec. He finished high school in Quebec before joining the Bruins' farm team three years ago.

Education:	1	
Age:	1	
English language:	3	
Adaptability:	0	
Total:	5	(fails)

Comments: At this point in time, Gilbert clearly does not have enough points to meet the pass mark to be a second-tier immigrant. An H-2B non-immigrant visa is possible for him. He may also qualify for a P visa.

Scenario 2: Now assume that Gilbert has played on the Bruins' Canadian farm team for three years, and his non-immigrant visa is about to expire. The Bruins think he has matured, and plan to use him as their starting goalie in Boston next year. Assume Gilbert has taken English classes during the last three years to improve his English.

the number of jobs that must be created from ten to three; (b) allowing investors who fail to substantially comply with the requirements after two years to remain in the United States in a new E-3 non-immigrant status; (c) reducing the capital investment requirement to $750,000; and (d) eliminating the differential investment requirement for different localities.

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Education:	1
Age:	3
English language:	5
Adaptability (nos. 1-4):	5[a]
Total:	14 (fails)

Comments: If Gilbert is going to be the Bruins' starting goalie next year, he would likely qualify for first-tier immigrant status as an alien of extraordinary ability. If so, the Bruins will not have to worry about the second-tier selection criteria system. If Gilbert does not qualify for immigrant visa status as an alien of extraordinary ability, however, he appears to lack enough points for entry under our proposed second-tier selection criteria system. In such a close case, the Bruins should be allowed to present evidence of his unique skills. If the evidence is compelling, the INS should approve the petition.

[a] Gilbert could qualify for all 5 adaptability points under the following assumptions: (1) if he worked in the United States whenever the Bruins' farm team played other NHL farm teams in the United States; (2) if he has received on-the-job training through instruction from his coaches and by attending special goalie training camps during the off-season; (3) if he has assumed a leadership role on the farm team, as evidenced by an affidavit from his coach; and (4) if U.S. hockey players are also on the farm team, thus showing that Gilbert has worked in a multi-country team setting.

MISCELLANEOUS AND SPECIAL IMMIGRANTS

EB-4 SPECIAL IMMIGRANTS

Currently, about 8,000 to 10,000 immigrants enter the United States each year in the employment-based, fourth-preference (EB-4) immigrant visa category. This category covers such disparate groups as religious ministers and workers, overseas employees of the U.S. government, former employees of the Panama Canal Company and their families, juveniles who have been declared dependent on a U.S. court, and retired employees of international organizations and their families.

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While this category is currently part of the employment-based stream, immigrants who enter under the EB-4 category are usually admitted regardless of their employment characteristics. The category is thus truly a miscellaneous category and should not be included in the economic-stream selection process. Instead, it should be changed to its own "miscellaneous" category. When setting up this new miscellaneous category, Congress should consider requiring religious ministers and workers to have at least three years of full-time prior experience abroad and to attest to their planned work in the United States.

ATHLETES, ARTISTS, AND ENTERTAINERS

Truly outstanding athletes, artists, and entertainers enrich the country's cultural and artistic life through their talents. They also enhance the economic well-being of the United States, both directly through their achievements and indirectly through exports of the products of their talents, such as books, movies, records, and broadcasts. The U.S. motion picture industry alone had exports of $2.53 billion in 1993 (Department of Commerce 1994:118). In addition, the United States has various reciprocal agreements in this area that govern the treatment of such personnel.

Extraordinary athletes and entertainers who now qualify for EB-1 status would continue to immigrate in our proposed top tier. Additional individuals are likely to qualify under the second tier, depending on their particular characteristics. The remainder might qualify for a non-immigrant visa, but might be able to stay here permanently only if they meet the second-tier criteria at a future time.

We propose that agents who represent artists, athletes, or entertainers be considered "employers" for purposes of second-tier immigrant visa status. For those artists, athletes, or entertainers who do not have an agent or business to sponsor them for second-tier status, we recommend waiving the employer sponsorship requirement if they meet three requirements: (a) five years of work experience, three of which must be as self-employed; (b) a net income of three times the U.S. poverty income guidelines for the past three years; and (c) evidence of contracts from U.S. clients for their first year in the United States that will total five times the U.S. poverty income guidelines.[102] Self-employed people who satisfy

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[102] The Department of Health and Human Services maintains federal poverty income guidelines for a variety of purposes. The guidelines are updated annually. The 1995 pover-

4-9. CASE EXAMPLE: ARIEL FROM FRANCE

Ariel is a violinist who graduated three years ago with a degree from a highly respected music conservatory in Paris. Since then she has played for various orchestras in Europe. The Syracuse Symphony wants to hire her as a section violin player. They picked her after doing blind screenings and an audition, where she clearly was the best qualified candidate. Ariel speaks fluent English. She is 24 years old.

Education:	4
Age:	1
English language:	5
Adaptability (nos. 1,2):	3[a]
Total:	13 (fails)

Comments: Ariel does not have the extraordinary ability needed to qualify under the first-tier immigrant visa category. Nor does she appear to have quite enough points to qualify under our proposed selection criteria for a second-tier immigrant visa, although she is close to the 15 point pass mark. Here the INS may propose to the citizen advisory board discussed earlier that Ariel should be given three points for her age, instead of just one, because her unique talent is not age-sensitive. This hypothetical scenario shows that the INS will need to have flexibility in administering the selection criteria system. *Such flexibility should be delegated to the INS by statute, so that the agency is not hampered by statutory roadblocks or congressional micromanagement.*

[a] Ariel satisfies adaptability factor number one because she has played in various orchestras around Europe. Assume she qualifies for adaptability factor number two because she has taken advanced master's classes in violin at summer music institutes in Europe since she received her degree.

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ty income guideline for one person was $7,470; for two people, $10,030; for three people, $12,590, and for four people, $15,150. Thus a self-employed athlete, artist or entertainer with a spouse and two children would have to show a net annual income of $45,450 over the last three years to meet the first part of our proposed self-employment test and would also have to have firm contracts netting $75,750 for the first year in the United States.

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these three prerequisites would also have to qualify under the general selection criteria discussed earlier before they could immigrate to the United States.

The requirement of five years of work experience (three of which must be as self-employed because of the special "skills" that success in self-employment requires) and adequate contracts for work in the United States address concerns that self-employment has very high failure rates, and that this category has a much higher than average potential for fraud and abuse. Furthermore, making self-employed artists, athletes, or entertainers satisfy the same selection criteria as other second-tier immigrants ensures that they have both a higher probability of success and the potential to make a continued substantial contribution to the United States.

RECOMMENDATIONS REGARDING NON-IMMIGRANTS

In a previous era, where resource-rich and populous countries could at least aspire to relative autarky in many areas, and contacts among states were relatively modest, the need for temporary workers was probably minimal and certainly impractical. In fact, with the exception of nomads, seasonal work between neighboring states, and people engaged in large construction projects (such as the Panama Canal), relatively few people engaged in systematic temporary migration. Today, for many of the reasons discussed throughout this study, the non-permanent, economic-stream immigration system dwarfs the permanent one, and its employment effects may approximate those of both family and refugee immigration. Furthermore, there is little doubt that the effect of the use of "non-immigrants" in many occupations is indistinguishable from that of any other type of worker—and in some instances, even turns temporary labor bottlenecks into structural labor market imbalances by creating niches occupied almost exclusively by foreign-born workers. Parts of the agricultural and garment industries are perfect examples of this latter phenomenon.

Reforming the non-permanent system requires even more care than reforming the permanent system, because thoughtful changes must overcome a far greater gap in our data systems and our understanding of how the non-permanent system really functions. As a result, defining the precise relationship between permanent and non-permanent immigration, and suggesting how the latter may be reformed, is partly an exercise in uncertainty.

As discussed earlier, non-immigrants who have a right to work should be admitted to the United States for the following reasons: (a) to fill a specific labor need, generally for a temporary period; (b) to discharge our international obligations under a variety of trade, investment, and cultural exchange regimes; (c) to facilitate international commerce and trade; or (d) to enhance the cultural and artistic life of the United States. Many of the current non-immigrant visa categories already satisfy one or more of those requirements.

We have also argued, however, that some economic non-immigrants should be characterized more accurately as "pre-immigrants." In many instances, employers hire them for specific needs, but also to determine whether they are suitable for permanent employment. This occurs primarily in the H1-B non-immigrant visa category. We believe that such "prospective immigrants" should be assigned their own non-immigrant visa category and be selected from a pool of individuals who possess the same basic characteristics that we require of immigrants, albeit to a somewhat lesser degree. The remaining H-1B immigrants should be required to adhere strictly to that visa's temporariness requirement.

Chapter 2 describes the current work-related non-immigrant visa categories. The discussion below identifies changes that we propose in order to make the various non-immigrant visa categories comport with the priorities outlined above. Not mentioning an existing category means that we propose no changes.

B VISA CATEGORY

No changes need be made to the B-2 tourist visa category. This category facilitates international tourism. In 1994, more than 16 million foreign tourists visited the United States, generating an estimated $60 billion in revenues to this country (U.S. Bureau of the Census 1994:264).

The B-1 temporary business category is generally fine in concept, as it facilitates international commerce and trade. As discussed in Chapter 2, however, the B-1-in-lieu-of-H-1B concept raises some concerns. This particular use of the B-1 visa should be reconceptualized and better formulated to accommodate the constantly changing nature of international business and to provide for the sound discretion of properly trained visa-issuing officials (see below) in deciding whether the proposed activity is consonant with the visa's intent.

In certain instances, a B-1 visa that appears to cross over into H-1B territory may be appropriate. The factors laid down 30 years ago in *Matter of Hira,* 11 I. & N. Dec. 824 (BIA 1965, 1966, Attorney General 1966) generally remain the best test for determining whether this is the case. As the Board of Immigration Appeals held and the Attorney General affirmed at that time, the significant considerations for B-1 classification are:

- A commercial activity;
- A clear intent by the alien to continue a foreign residence;
- The principal place of business and the place where most of the profits eventually accrue remain in a foreign country;
- The alien's salary comes from outside the United States;
- The alien's stay in the United States is temporary, although the business activity itself need not be, and indeed may long continue; and
- The alien is a businessperson or, if employed, is pursuing an activity that is a necessary incident of international trade or commerce.

The third point, concerning the place where profits accrue, may need to be reconsidered, however. In today's global economy it can be nearly impossible to prove the corporate "nationality" of a multinational corporation. Determining the location of profit accrual can be open to a wide range of interpretations, depending on the criteria used. Therefore this point should be amended to focus solely on the ultimate financial benefit from the foreign national's activities and associated products/components, not the overall profit of the company.

Ultimately, only a properly defined concept of the B-1 visa category, using modified *Hira* factors, can determine when it is appropriate to issue a B-1 visa. For example, assume that an employee of the foreign subsidiary of a U.S. software company comes to the United States to meet with colleagues about adapting a certain software product for the foreign market. Certainly, B-1 classification is appropriate for the foreign employee to impart his knowledge of the foreign market to his U.S. counterparts, so that they can make the necessary changes. It would probably be inappropriate for the foreign employee to engage in "keyboarding" for the sole purpose of hands-on creation of software code. However, just as the tailor in *Hira* would presumably be permitted to make minor alterations to an essentially completed garment, so too a foreign software specialist should be allowed to perform incidental coding or de-bugging at the final stages of software development and production. In other words, a close analysis of the purpose and result of the activities to be engaged in, rather than an outright prohibition of a given activity, is necessary if we are to accommodate the constantly changing nature of international business. Abuses of the B-1 visa category should be controlled by better regulations and more active enforcement, not by eliminating the category altogether for certain legitimate business activities.

Care in changes to the B-1 visa is also necessary because of the reciprocal nature of international trade. If the United States severely curtails access to this category, other countries may retaliate and impose similar bans on U.S. workers wishing to enter and conduct similar activities in their countries. Our trade commitments (both within the General Agreement on Trade in Services and the North American Free Trade Agreement) have bound this use of the B-1. For this reason, radical changes to this visa would require difficult renegotiations and could lead to trade-related sanctions against the United States.

D VISA CATEGORY

It is unclear whether this category for foreign crewmen needs any changes. As noted in Chapter 2, very few attestations for longshore workers under the D category have been filed since the attestation requirement took effect in 1991. The small number of attestations could mean that: (a) the attestation process was well designed and no changes are required because it has deterred unacceptable practices; (b) the provision is rarely used because very few foreign longshore workers fall under the act's purview; or (c) the attestation process is so bureaucratic and burdensome that most people are not using it. In the absence of any evidence as to which of these propositions is true, we recommend that the DOL and the State Department prepare a joint report on the implementation of the D-visa attestation process for foreign longshore workers in the United States. The report should contain a cost/benefit analysis of the current regulations and assess whether such an interventionist regulatory regime is necessary, especially considering the small number of people it affects. One possible change might be to negotiate reciprocal arrangements with key shipping countries. This might be a more efficient way of handling this issue.

E VISA CATEGORY

This category for treaty traders and investors is essential to international commerce and trade. Because it is covered by international commitments, our ability to tinker with the E visa is limited. The INS and the State Department are in the final stages of revising their E visa regulations,[103] and we support their proposed changes. The revisions include heightened scrutiny of E visa employees who have "special qualifications" and are "essential" to the company. Under the State Department's proposed revisions, the employer would have to demonstrate that the job cannot be performed by U.S. workers and that the employer plans to train such workers to replace the foreign employee. However, there would be no mechanism for enforcing this provision beyond the visa-issuing officer's sense of the company's sincerity and ability to follow through on its promise. This issue, and similar issues regarding the L visa category for certain multinational executives, managers, and employees possessing specialized knowledge, might better be handled in negotiations with other countries to try to achieve reciprocity. Bilateral and multilateral regulatory regimes are generally preferable to unilateral attempts at regulation on these issues.

F VISA CATEGORY

The provisions of the foreign student category are generally appropriate. Foreign students should continue to be allowed to work off-campus if the work is related to their academic studies. The INS should also consider extending actual training options for foreign students in F-1 and J-1 status (see below), so that employers would still be able to hire qualified foreign students on a short-term basis. However, there is at least *a potential* adverse effect on U.S. workers from the employment of F-1 students. For that reason, we propose requiring employers of F-1 students to file a wage attestation similar to the one proposed for second-tier immigrants. This would help ensure that a level playing field exists between F-1 workers and their U.S. counterparts.

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[103] We understand that the Office of Management and Budget approved the State Department's version of the final E visa revisions over a year ago, but that the INS is still finalizing its revisions. The two agencies plan to publish their final rules simultaneously.

Work authorization for economic hardship should also be maintained, although the INS should tighten its oversight of "economic hardship." The Casals report discussed in Chapter 2 found that while on average only about 10 to 20 percent of F-1 foreign students obtain work authorization based on economic necessity, almost 75 percent of F-1 foreign students at one college worked off-campus under this exemption. Such a statistic raises questions about possible abuse of the exemption and suggests that the "primary purpose" for which some of these students came to the United States may have been employment, rather than education.

The pilot off-campus work program should be eliminated, because it allows foreign students to engage in general labor unrelated to any verifiable unmet labor need. The F-1 attestation process has not worked; very few employers have used it, and in many instances, schools can issue work authorization for their students through other available means. This recommendation is consistent with the recommendations of the DOL and the INS, as expressed in their joint report to Congress in 1994 evaluating the program.

H-1B VISA CATEGORY

We propose that this category be renamed the H-1 category and that—after it is purged of workers who more properly belong in the revamped H-2B category discussed below—it be limited numerically to no more than 10 percent above actual usage for the previous year. The renamed category would use the same selection criteria we propose for the second tier of the immigrant visa system, but with a lower pass mark (perhaps 12 points instead of 15). The required number of points could be adjusted periodically to reflect broader economic and labor market conditions. We do not propose a work experience requirement for the H-1 category, as we do for the second-tier immigrant visa category. We believe that our proposed selection criteria, as well as the other safeguards we would require, are sufficiently robust to satisfy the national interest, as reflected in the organizing propositions set forth at the beginning of this chapter.

ATTESTATION REQUIREMENTS

H-1 employers would have to attest that they would comply with three of the four conditions that they comply with now for H-1B purposes, *plus a new recruitment condition.* First, the employer would still have to offer the higher of either (a) the "actual wage" the employer pays to other individuals similarly employed with similar qualifications; or (b) the "prevailing wage" for that position. As suggested in our discussion of the same requirement for second-tier economic-stream immigrants, we recommend abandoning the current reliance on SESA prevailing wage determinations and instead developing prevailing wage and total compensation package information from reliable non-governmental, industry-specific sources. Such non-governmental surveys could thus be used for both immigrant and non-immigrant visa economic-stream petitions.

Currently, H-1B employers must also attest that the working conditions for an H-1B worker will not adversely affect the working conditions of other workers similarly employed. We propose deleting this requirement, since most of its provisions would be covered under the "total compensation package" concept that our wage attestation is intended to cover. While such an attestation is comforting to U.S. workers in concept, it has proven virtually impossible to define or enforce. It thus has proved to be a meaningless protection. Moreover, this form of "protection" relates to low-skilled workers in low-paying jobs, where the power inequality between employer and worker is greatest and the ability of workers to defend themselves is smallest; the more educated workers in the H-1B system encounter far fewer of these practices and are better able to deal with them.

Second, employers would have to attest that there is no strike or lockout at the place of employment. An employer would not be able to petition for an H-1 worker to replace a U.S. worker who is on strike. As with visas for second-tier immigrants, and with the same caveats (see above), we propose strengthening this attestation requirement by creating a higher level of scrutiny for employers who petition for an H-1 worker to replace a U.S. worker who has been laid off. The parameters and details of such scrutiny should be negotiated between regulators and the affected constituencies and should be in regulatory rather than statutory form.

Third, as for second-tier immigrants and for the same reasons, employers would have to attest that they have given notice of the filing of the attestation to the appropriate worker representatives and/or directly to their employees.

Fourth, we propose a new recruitment requirement. Under this requirement, the employer would attest that the process through which the foreign worker was selected is the employer's and the industry's customary way of making hiring decisions for this kind of position. *Customary recruitment practices* normally include advertising job openings in the employer's usual manner, screening resumes, interviewing some of the applicants, and hiring the most qualified candidate. Industry standards change over time in response to changing economic conditions. For example, a company may have to recruit nationally for a certain kind of engineer during boom times, but it may find enough qualified applicants locally during a downturn. We propose that—to better understand the industries they regulate—INS and DOL regulators should, as a matter of course, include organized discussions with panels of human resources managers from various industries in *all* of their training sessions and meetings.

The proposed recruitment requirement need not be intrusive. The employer should not have to submit any documentation with the attestation to demonstrate recruitment efforts. However, documentation would have to be available for inspection by the DOL or INS in the course of an investigation by either agency. If such an investigation occurs, the employer could satisfy the recruitment attestation requirement by showing a copy of the job posting, tear sheets from ads in newspapers or professional journals, resumé/recruitment summaries, interview results, or whatever else is customary in the industry.

Finally, as in the second-tier immigrant visa category, employers would have two ways to satisfy our proposed attestation requirements: (a) prequalification or (b) case-by-case.

We propose that Congress limit the H-1 non-immigrant visa category to a three-year term—which could be extended on a case-by-case basis for one year to allow a worker to complete an important project. This would reflect more faithfully the intent that employment in this visa category be temporary and would create an incentive for employers to choose H-1 workers carefully. In addition, and to further encourage a more equal relationship between employers and their foreign workers, consideration should be given to empowering H-1 visa holders to change jobs after the first year if another employer is willing to pay them a premium (perhaps 10 percent) over what they are currently earning. This would give the original (or previous) H-1 employer an incentive to pay the going wage or risk losing the employee to a higher bidder. The idea is to create as many incentives as possible for

H-1 workers to be non-dependent labor market actors. In this way, a more level playing field is created for U.S. workers.

At any time after the first year and before the three-year period ends, an H-1 employee could petition for an immigrant visa under our first tier or, more likely, seek an employer who would petition for an immigrant visa on his or her behalf under our proposed second tier. This would in effect allow H-1 workers to behave like "prospective immigrants" and would put employers on notice that they will not be able to engage a foreign worker whom they are "sponsoring" as a non-permanent worker for an extended period unless that worker can ultimately qualify for an immigrant visa. While employer sponsorship would continue to be the key requirement for obtaining an immigrant visa under our proposed second tier, the sponsor would not have to be the original employer, thus strengthening the worker's hand in employment negotiations.

H-1 workers who cannot obtain an immigrant visa during the three-year period would have to leave the United States when their H-1 visa expired, and they could not be readmitted for one year in any work-related non-immigrant visa category. This requirement would create a very significant *new* protection for U.S. workers by breaking the cycle of certain jobs being permanently filled by foreign workers.

Finally, we propose giving the DOL explicit authority to target potentially high-fraud and severe-exploitation practices to best use its limited enforcement resources. One easy way to focus H-1 investigations might be to determine whether an employer's W-2 statements are less than the required wage stated on the attestation form. Congress might consider requiring employers to file W-2 statements for H-1 employees along with their H-1 attestations every year to make it easier for the DOL to compare the two wage listings. Indeed, the mere fact of requiring such filings would be likely to discourage unscrupulous employers from filing H-1 petitions. Giving the DOL additional tools for conducting preliminary audits of possible H-1 violations may make it less necessary to conduct time-consuming investigations based on mere paperwork violations. Anonymous complaints should also be permitted—to protect "whistle-blowers" from employer retaliation. Any investigations of alleged H visa violators should be done as part of a more general enhanced DOL inspection/enforcement effort geared to workplace violations.

These proposals are consistent with the thrust of the Clinton Administration's strategy for deterring illegal immigration and reducing regulatory burdens by having federal agencies target enforcement efforts on "high-risk" areas, rather than across the board. Last year, President Clinton ordered the DOL to "intensify its investigations in industries with patterns of labor law violations that promote illegal immigration." President Clinton also announced his intent to increase the number of workplace investigators by 85 percent (Office of the Federal Register 1995a:199-204).

Significantly, our recommendations for the H-1 category are fundamentally consistent with U.S. international commitments in this area. As part of the GATS, the United States recently agreed to freeze the essence of the current H-1B program but created room for three possible future changes: (a) reducing the maximum length of the visa from 6 to 3 years; (b) instituting a provision that would prohibit employers from laying off U.S. workers and then using H-1B workers in the same occupation; and (c) requiring employers to take significant steps to recruit and retain U.S. workers. Our proposals are consistent with the first two of these provisions. Furthermore, we believe that our proposed recruitment attestation requirement is consistent with the spirit of the third element.[104]

H-2A VISA CATEGORY

This visa category allows foreign agricultural workers to work temporarily in the United States following a test of the labor market and strictly regulated attempts to hire U.S. workers. We propose that serious thought be given to replacing this category with a program that focuses on enhancing employment opportunities and the wages of U.S. agricultural workers, while acknowledging the unique nature of that labor market, its binational (primarily Mexican) composition, and the historical (and future) reliance of that sector on a foreign workforce. A proposal addressing this issue will be the subject of a separate study.

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[104] The modified selection criteria component of our proposed H-1 visa category theoretically could conflict with GATS. For example, a computer programmer with a bachelor's degree who speaks only a little English can currently obtain an H-1B visa easily. However, under our selection criteria, it is possible that such a person might not qualify for H-1 classification. If so, his or her country could claim that the United States is discriminating on the basis of nationality. We contend, however, that our proposed selection criteria are a filter to evaluate *all applicants' personal characteristics* and thus do not violate the equal treatment principles that underlie our multilateral obligations.

H-2B VISA CATEGORY

This visa category for non-agricultural temporary foreign workers should be comprehensively rethought and revised. We recommend that the INS be asked to analyze what kinds of workers and employers use the H-2B category and to propose to Congress which of those uses might more appropriately be placed in other non-immigrant visa categories. Based on that analysis, components of the current H-2B category that are primarily cultural in nature, such as camp counselors, should be incorporated into a revised and appropriately reconfigured J category. Other uses of the category (e.g., for fishermen and household employees) might also be moved to more appropriate categories.

The objective of this exercise would be twofold. First, it would more rationally allocate types of activities to their proper visa category. Second, it would fashion an H-2B visa that is more than just a catch-all category but that focuses on the types of jobs that are intended to be—*and in fact are*—truly temporary in character. It is here that we would expect the *genuinely temporary strand* of H-1 workers gradually to find a "home" (see the discussion of the H-1 visa category earlier in this chapter). In reconfiguring this category, a variation of the double-temporary standard (i.e., that both the foreign worker and the job itself be temporary) should be maintained, as should the maximum number of two one-year renewals; such renewals, however, would have to be made more readily than is now the case.

We also recommend eliminating the current labor certification system for H-2B workers, for the same reasons that we propose eliminating the permanent labor certification program. In its place, Congress should enact an attestation system like the one suggested for the H-1 category above. The principal difference between the two attestation systems would be that the one for H-2B should experiment with a more stringent recruitment requirement *and* an emphasis on training U.S. workers for some of these jobs.[105] For instance, many of the occupations now receiving "blanket" permanent labor certifications (such as physical therapy or many classes of "specialty cooks and chefs") require modest amounts of education and training. We can think of no reason why such an "industry" should be turned over *a priori* to foreign workers (who, according to our proposals, would essentially be excluded from permanent entry because they would be unable to meet either our second-tier immigrant or H-1 non-immigrant visa requirements).

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[105] the recruitment and training requirements should be negotiated with key employment sectors (such as that for physical therapists) that may end up accounting for large chunks of the "new" H-2B category.

By experimenting with a set of incentives and disincentives for the employment of many H-2B workers, we can at least test the proposition that there are some occupations in which a much larger share of the labor demand might be satisfied by training U.S. workers, including foreign-born individuals entering under the immigration system's other two streams: families and refugees. This would be particularly relevant and appropriate for many lower-skill occupations—ranging from household workers to "specialty cooks/chefs"—where a person's personal characteristics, such as language, ethnicity, familiarity with a particular cuisine, etc., is presumably valued by the employer. In most cases, it is ludicrous to argue that "shortages" exist in these occupations.

J VISA CATEGORY

This visa category for various types of exchange visitors should be retained because of the complex and varied nature of international cultural exchange, education, and training. The culturalcomponents of other non-immigrant visa categories, however, such as those of the H-2B and Q visa categories, should be incorporated into a revised, expanded, and more closely managed J category.

In keeping with the purposes of the J visa, work authorization should be truly incidental to the primary cultural-exchange, educational, or training purposes. In order to better serve U.S. workers' interests, any work authorization should require compensation at full market rates.[106] If J-1 sponsors pay part of the J-1's wage, this should be factored into any determination of the total compensation package.

The current *au pair* program does not comport with the spirit and aims of the J visa category. Despite the USIA's recent attempts to control abuses in this program and make it more culturally focused, most U.S. families who use the program view it first as a work program and only then as cultural exchange. This is one of the main reasons why the USIA has been stating publicly for many years (and even more forcefully within successive administrations) that it does not feel comfortable administering the *au pair* program. Thus, we recommend the program's radical restructuring so that it serves the same purpose it does in many other countries: providing a mutually valuable cultural exchange for the *au pair* and the family with whom he or she lives, with the work component not exceeding 30 hours per week. We acknowledge that this limitation will inconvenience many of the two-profession families who now use the program, but the integrity of the visa's intent demands it. It should not be the job of the immigration system to subsidize the child-care costs of families who have access to, and in most instances can afford, alternative arrangements.

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[106] Determining appropriate wages for J exchange visitors can be done as proposed for H-1 purposes: by allowing employers to use non-governmental wage surveys.

We also recommend that administration of the revised and expanded J program be transfered from the USIA to the INS, the agency with the broadest mandate and expertise in this area. The INS already has experience administering visa applications of this type, for example in the current H-2B and Q categories. It could administer J programs without significant additional expenditures, especially since much of the current J program is run by responsible officers at sponsoring organizations. The transfer should be at least revenue-neutral, and in all likelihood could save a modest amount of money. Furthermore, the INS would have the enforcement oversight capability now lacking from the USIA-administered program. Thus, the recommended transfer would also move us toward *the consolidation of all functions in the immigration agency*, an objective that underlies the comprehensive rethinking of the country's immigration function to which this study aspires.

COUNTRY QUOTAS AND ANNUAL CAPS

One provision contributing to the inefficiency of the current system is the annual cap on immigration worldwide and, within that, from individual countries. The basic premise underlying our recommendations has been that both permanent and non-permanent economic-stream immigration should make the strongest possible contribution to the economic health of the United States. It follows that such immigrants should be selected and admitted with little regard for their nationality, just as is now the case for non-immigrants. If this translates into a disproportionate number of immigrants coming from a relatively few countries, that should be of little concern to the economic-stream component of the U.S. immigration system.

Moreover, there is no reason to believe that the country profile of entrants under our proposed system would vary greatly from the profile of immigrants and non-immigrants entering under the current system (see figure **4-10**). Country quotas may be desirable in other contexts—to promote more diversity in the immigrants we select through the family categories—but they have no natural home in the economic immigration selection system. If Congress deems it politically critical that no one country dominate U.S. economic-stream immigration, a system can be devised to ensure that no country can account for more than a given proportion of all permanent visas under any category.

There is also no need to fear that a sudden influx of foreign workers would occur under our system. If anything, economic-stream immigration is likely to be lower under our recommendations than it is under the current system. First, we would eliminate the unskilled worker component of the EB-3 category and severely restrict access to many workers now entering the United States under the category's remaining components.[107] Second, we propose moving the EB-4 category out of the economic-stream component to its own "miscellaneous" category and managing it more closely, since immigrants who enter under the EB-4 category are

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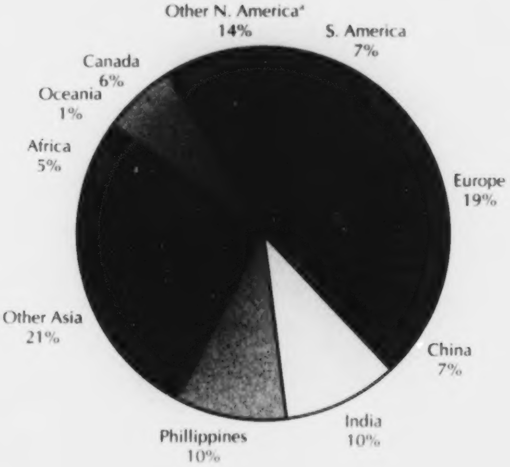
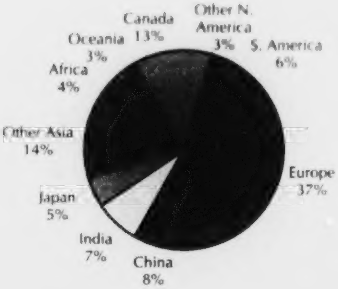
[107] About 78,000 people are currently waiting to receive an EB-3 unskilled worker immigrant visa. That number, while seemingly high, is actually down 16 percent from a year ago—an extraordinary development given the slow rate at which this backlog has been decreasing in recent years. The State Department speculates that the sharp drop in EB-3 unskilled worker registrants may be due largely to the long wait for visa determinations—currently about five years. Other contributing factors are the 1990 Act's unmistakable message that the United States is not interested in admitting large numbers of foreign unskilled workers through its employment categories, and the lower overall tolerance and demand for foreign unskilled workers, many of whom are waiting for their visas in illegal status. The more rapidly advancing "priority date" for unskilled workers may indicate that the number of people actually waiting to immigrate in that category may not be as great as commonly thought. In any event, we recommend that all pending EB-3 unskilled workers be allowed to complete their immigrant visa applications, out of fairness to those who started the process and have expended significant resources without knowing that Congress might change it later. Considering that all EB-3 unskilled worker applicants are probably in the United States and already employed, the employment effect of following that course of action would be neutral.

4-10. Employment-Based Immigration, by Region and Selected Country of Origin, FY1994

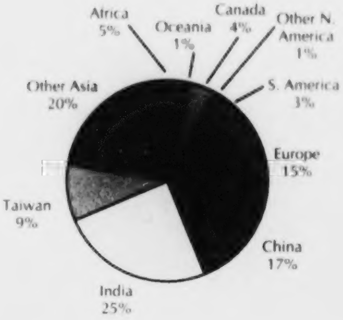
Total Employment-Based Principal Immigrants (excluding those admitted under the Chinese Student Protection Act)



EB-1 Principals: Priority Workers



EB-2 Principals: Immigrants with Advanced Degrees or Exceptional Ability

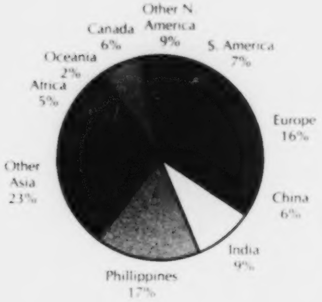


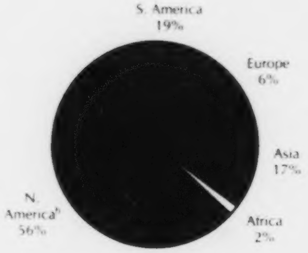
[a] Includes Mexico, Central America, and Caribbean.

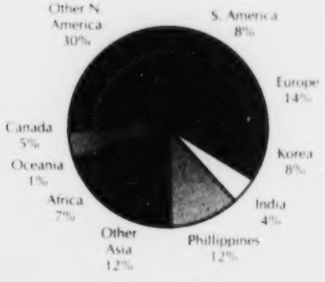
[b] Canada, Mexico, Central America, and Caribbean.

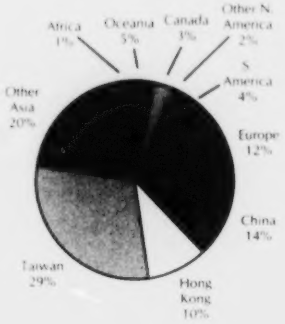
Source: U.S. Immigration and Naturalization Service. 1996. *1994 Statistical Yearbook*. Washington, D.C.: U.S. Government Printing Office.

4-10. (continued)


EB-3 Principals: Professionals and Skilled Workers Only


EB-3 Principals: Unskilled Workers Only


EB-4 Principals: Special Immigrants


EB-5 Principals: Investors

4-11. REFLECTIONS ON IMMIGRATION AND THE COUNTRY'S DEMOGRAPHIC FUTURE

In today's political context, with its single-minded preoccupation with limits, numbers have taken on lives of their own and seem to be driving the debate to an unhealthy degree. In the absence of a broader and more systematic discussion about U.S. population levels, policies that are motivated primarily by concerns about the future size of the U.S. population are not, in our view, appropriate subjects for consideration by immigration legislation at this time.

This is not meant to dismiss the importance of the demographic effects of significant levels of immigration. Rather, it is intended to suggest that such a discussion must take place in the context of a more complete understanding of the full effects of a larger U.S. population (both positive and negative) and without the racial and ethnic fears and tensions which some of what passes as "research" on these issues (such as Brimelow's *Alien Nation* [1995]) seek to kindle and then exploit politically.

The kind of discussion we believe is needed on this issue must go beyond sensationalism and address the true policy issues. For instance, as Minkin (1995) suggests, unless present trends change

usually admitted regardless of their employment characteristics. Third, it is likely that fewer immigrants will qualify under our proposed second tier than under the current EB-2 category. The selection criteria we propose are considerably more stringent than current law and practice. Those criteria, combined with the other safeguards we propose, such as the three-year work experience requirement and the attestation elements, are likely to lead to economic-stream immigration numbers that are well below today's maximum ceilings and closer to the actual usage of between 80,000 and 100,000 (see figure 2-2, p. 42).

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significantly, the Asian American population may well continue to grow at approximately twice the rate for Hispanics and eight times that for whites; California whites will almost certainly become a minority very early in the next century; Hispanics will certainly surpass blacks as the nation's largest minority soon thereafter; finally, present minorities, combined, may well become a majority before the end of the next century.

These trends do mean that more effort needs to go into shaping and managing them and that both public and private sector institutions will need to adapt accordingly—particularly in terms of managing the social infrastructure demands that these changes imply. (For instance, whites will continue to age—probably reaching a median age of more than 45 by mid-century—while the median age of Hispanics will probably remain close to its current levels of late twenties. This suggests sharply different social and health-care needs for the two populations.) *However, nothing in these changes themselves suggests that our country will be weaker as a result of these demographic events.*

Of course, we understand that, from a political perspective, Congress and the American people would not tolerate even the theoretical possibility of open-ended immigration, however robust the safeguards or well-administered the system (see box **4-11**). For that reason, we propose that Congress set a formula that caps economic-stream immigration at no more than 15 percent higher than actual usage in the previous fiscal year. This would allow greater flexibility than a "hard" cap, which would require legislation to amend. It would also ensure that economic-stream immigration does not vary dramatically from year to year. Perhaps most impor-

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tantly, this method would allow employers adequate flexibility if the economy suddenly improves or if they encounter a true shortage of talented U.S. workers in an emerging growth area and need more skilled foreign workers.[108]

We recommend that a similar concept be put in place for the H-1 and H-2B categories, but with a tighter upper limit: actual usage from the previous year plus 10 percent, not 15 percent. This tighter limit is appropriate both because of the lower points threshold we propose for these categories and because the changes we recommend to the H-2B program may have unanticipated demand effects.[109]

The flexibility we would build into our proposed selection criteria should make them acceptable politically. If actual usage increases by the maximum percentage one year, administrators could investigate the causes for such an increase and might choose to raise the pass mark needed to qualify for the second-tier immigrant visa category and/or the H-1 non-immigrant visa category to help control growth in overall immigration the following year.

ADMINISTRATIVE, MANAGEMENT, AND ORGANIZATIONAL ISSUES

So far, this study has focused on examining the role that economic-stream immigration should play in a constantly transforming economy, who these immigrants should be, and how they should be selected. In the discussion that follows, we sketch some of the key administrative and organizational changes that we believe are necessary for the fullest implementation of our proposals. Some of our recommendations are simple; some address fundamental organizational issues that are deeply rooted in the way the U.S. immigration function is organized within the federal governmental structure and how it is distributed among federal, state, and local levels. In all instances, the recommendations may prove every bit as provocative as the rest of our discussion—as they too challenge entrenched interests and the procedural *status quo.*

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[108] Alternatively, Congress could instruct the INS to set an annual cap or range on economic-stream immigration by looking at various factors such as economic forecasts and unemployment projections. Such an approach, however, suffers from the same problems as the labor market information concept analyzed in Chapter 3, and creates an illusion of objectivity while in fact relying to a very substantial degree on imprecise proxies and subjective judgments.

[109] Dependents of economic immigrants and non-immigrants would be able to immigrate with the principal alien, as they currently do, and would continue to be charged to the principal's visa category.

REORGANIZING THE FEDERAL IMMIGRATION STRUCTURE

A recurring theme among students of immigration is the need to consolidate most immigration functions into one agency to reduce costly duplication and inefficiencies. At present, immigration functions are scattered not only among the INS and DOL but also among the Bureaus within the Department of State (Population, Refugees and Migration, and Consular Affairs), and the Department of Health and Human Services' Office of Refugee Resettlement. Other agencies, such as the Department of Education and the U.S. Information Agency, also have minor but significant immigration roles. Almost all of these functions could be performed more efficiently and economically by a larger, "re-engineered," and more independent INS. We consider such changes essential to a revamped way of conducting our immigration "business."

Such management changes will require comparable changes in the legislative function that is now divided among too many congressional committees and subcommittees. Accordingly, we propose that an independently convened study group—including representatives from the affected agencies, key congressional committees, management experts, and knowledgeable outsiders—study the reorganization issue and release, early during the next administration's term, a report on this critical matter.

With this daunting task in mind, we propose to begin the discussion about reorganizing the immigration function at the federal level with the following recommendations—although we are not, pending further study, wedded to specific details.

THE IMMIGRATION AND NATURALIZATION SERVICE

Congress should give the INS an independent status that accords with its size (it now has nearly 21,000 employees with approximately 24,000 positions authorized) and responsibilities now and in the future. Congress, along with the administration, should also give priority to consolidating most immigration functions in the agency. Such consolidation would reflect more properly the importance and complexity of the INS' mission. It should also produce an improved sense of identity, enhance morale and loyalty within the agency, and allow it to better balance the competing demands of law enforcement and effective service to clients.

To make the proposals outlined in this study work effectively, the INS needs to develop a specialized corps of adjudicators whose sole responsibility would be to handle economic-stream immigrant and non-immigrant visa applications. These adjudicators would need to be trained intensively in understanding U.S. business conditions and characteristics. They would need to be posted both at INS regional offices in the United States *and at U.S. consular posts overseas.* There they would replace, primarily through attrition, consular officers who now issue business-related and work visas. This corps of INS visa adjudicators would be the vanguard of a larger group of INS officers who, like their counterparts in Canada and Australia,[110] should gradually absorb most of the functions now performed by the State Department's Bureau of Consular Affairs. Having this specialized corps of INS visa adjudicators would also help speed adjudication of all petitions at INS regional service centers, which is critical to avoiding delays.

THE DEPARTMENT OF LABOR

Under our proposed system, the labor certification and related functions now performed by the DOL's Employment and Training Administration (ETA) would no longer exist. ETA personnel should be absorbed into the INS to help that agency with its increased duties, while the DOL would continue to have policy advisory and enforcement functions. Continuing the former would allow the Secretary of Labor to play a proper role in the administration's deliberations on immigration policy.

THE DEPARTMENTS OF STATE AND HEALTH AND HUMAN SERVICES

As we have already indicated, we recommend that many of the visa issuing functions now performed by the State Department's Bureau of Consular Affairs be subsumed into the INS, beginning with work-related immigrant and non-immigrant visas but eventually extending to all visas. A streamlined Consular Affairs Bureau would continue to perform its core foreign policy–related functions, such as passport issuances and citizen services. The State Department's Bureau of Population, Refugees and Migration would continue to discharge its specialized mandate, but its refugee resettlement functions, *together with the resettlement functions now residing within the Department of Health and Human Services,* should be folded into the INS.

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[110] Both of these countries have independent immigration cabinet departments that are responsible for the entire immigration function.

DATA COLLECTION AND EVALUATION

Regardless of the specific changes made to the U.S. immigration system, we need to make a commitment to better data collection and evaluation. Few weaknesses of our current system are more frustrating to analysts, policy-makers, and the public than the inability to answer many questions regarding the characteristics, behavior, and needs of immigrants and non-immigrants with any degree of confidence or reliability. It is inconceivable that a country for which immigration constitutes such an extraordinary component of economic, social, cultural and political change would continue to tolerate legislating in the dark. Hence, Congress must make it clear *in legislation* that it values such information and analysis, that it expects the relevant agencies to attain these goals and that it will monitor their achievement.

Hence, any change in the immigrant selection system must be accompanied by a demand that its continuous evaluation be set up simultaneously, so that we might be able to understand how the new system is performing from the very beginning. In addition to answering such questions as the socioeconomic profiles of the new immigrants, how immigrants *in each admission category* are performing economically after entry, or the length of adjudication times, numerous broader analytical questions that cannot be answered with current INS data should be answerable with any new setup. Among these should be comparisons of the process and rate of economic and social incorporation of immigrants from different countries of origin, the economic performance by immigrants and non-immigrants in each of the economic stream's categories over time, and the economic and labor market effects and other impacts (including social infrastructure demands) of newcomers on the areas where they settle.

Ideally, we should follow sample cohorts of immigrants selected under the new economic-stream system over an extended period of time, so that we can determine how well they are adjusting to life in the United States, assess their long-term contributions to our economic and social life, and better answer the questions posed above. Though expensive, such longitudinal studies are not methodologically difficult. Australia has already started a five-year longitudinal survey of 5,000 recently arrived immigrants. The Australian government undertook the survey because it realized that to fully understand immigration and settlement processes, the same individuals must be studied at different stages of those processes. The Australian survey is estimated to cost AU$3 million, spread over six years.

Once the INS' data collection systems are revamped, we should expect the agency and private sector analysts to be able to conduct analyses that answer key policy questions in all visa categories, not just in the economic stream. Models of effective data systems exist in other countries, particularly in Australia, and learning how these countries have set up their immigration data systems could be particularly useful.

INITIAL IMPLEMENTATION AND TRIENNIAL REVIEW

For our proposed selection system to succeed, there must be a "new" INS that commits to serving its clients and working cooperatively with other agencies. Transparency, simplicity, efficiency, and fairness should be hallmarks of the new system. The agency must also begin to encourage self-criticism and become more open to relationships with private sector research institutions. Only then can Congress conduct its necessary oversight function effectively. For its part, the executive branch must be willing to give the INS more autonomy in both policy and management matters; micromanagement and duplication of key policy and management portfolios do not lead to either better policy or to better management.

The economic-stream selection system we have discussed here should take effect *no sooner than* one year after enactment, at the start of the federal government's fiscal year. Once the new system is in place, it must be reviewed regularly to make sure it continues to accord with the changing needs and interests of the country. We thus propose that Congress require the administration to prepare and submit a report every three years on how the entire immigration system has functioned during the reporting period. The report should also be required to include proposed revisions and adjustments that would make immigration policy more consistent with changing social and economic needs.

The executive branch has a sorry record with such reports. The Immigration Reform and Control Act of 1986 and the Immigration Act of 1990 both required similar reports, but the administration has only issued two such reports so far, only one of which met most of the requirements proposed here. In turn, Congress has shown indifference to such reports by paying no attention to them in oversight hearings and by failing to ask for the reports it fails to receive. Both branches of government thus continue to show disinterest in the fundamentals—a totally irresponsible attitude.

Under our proposals, the first triennial report should be due three years from the start of the new system. This would give the government sufficient time to set up its observation points and evaluative criteria and to begin to understand the dynamics that the new system creates. Building regular reviews into the system has several additional advantages. Perhaps most important, it means that the system does not have to be perfect from the beginning. We can thus begin to think of changes to immigration practices as iterative processes, where we are flexible enough to correct, adjust, tinker, and improve. *Even regulators may become more flexible and willing to take some risks if they know that they are not, as at present, asked to anticipate every contingency, and that they have the authority and resources to make necessary adjustments.*

COMPLIANCE ENFORCEMENT

Any immigration system must have a credible enforcement component to deter fraud and deny immigration benefits to people who do not qualify for them. To promote efficiency and pay for compliance efforts, the INS should develop a fee structure that reflects both the agency's true costs for doing a much better job and for supporting the DOL's enforcement apparatus. At present, while the INS charges fees for helping U.S. businesses obtain foreign workers, the DOL charges none at all. This is directly contrary to the principle, espoused by the Clinton Administration, that beneficiaries should pay market-related rates for special government services. Therefore, a funding mechanism should be established by Congress that uses dedicated fees to adjudicate all work-related visa petitions filed under the new system within two months, thus guaranteeing the efficient and timely functioning of economic-stream immigration.[111]

Improving the capabilities of the INS and the DOL to detect and punish violations of the rules governing economic-stream immigration is generally beyond the scope of this report. We recommend, however, that any legislation creating a new economic-immigrant selection system also earmark examination-fee money to enhance the government's ability to investigate possible fraud in employment-related cases and deport ineligible individuals quickly.

THE NEED FOR BETTER COOPERATION BETWEEN BUSINESS AND GOVERNMENT

For our recommendations to succeed—and not just in the enforcement area—there must be a new sense of cooperation among business, workers, government regulators, and other affected groups. The importance of such cooperation cannot be overemphasized.

Both business and government share the blame for the failure to cooperate. Business often acts as if it should have the right to operate without restraint in a competitive global environment. It has been slow to acknowledge that some companies routinely violate immigration-related laws and regulations, or to recognize that illegal business practices give a black eye to, and result in additional regulatory burdens on, all corporate citizens.

For their part, government agencies have focused too heavily on regulation and enforcement as a way of discharging their responsibility for protecting U.S. workers. The prevailing culture of secrecy within the INS and especially within the DOL—born in large part of a fundamental mistrust of business—reinforces this "disconnect." It spawns preventable legal challenges, reinforces business suspicions about the agencies' intentions, and, in the end, often forces the two agencies to backtrack when challenged. The agencies have been slow to acknowledge that their regulatory and enforcement framework must focus more sharply on targeting instances of egregious conduct, while allowing other businesses to conduct their hiring and immigration-related practices without having to contend with regulations that are disruptive, intrusive, and ultimately counterproductive.

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[111] We note our concern, however, that the INS should not try to make employers pay more than their fair share by creating numerous "indirect expenses" that the agency claims support adjudication of economic-stream petitions. Such criticism already exists concerning the current examinations fee account. Congress should also assist the INS in making sure that fees from economic-stream petitions go immediately to the examinations division at the INS, without the need to go through the normally lengthy budget planning or reprogramming procedures.

An honest and open dialogue between business and government on immigration-related labor regulations is badly needed. Its aim should be to conceive and implement regulatory and enforcement methodologies that simultaneously serve the interests of U.S. workers and broader U.S. economic interests. Business must acknowledge and help the DOL and INS obtain the appropriate legislative and regulatory tools for carrying out their enforcement mandates while simultaneously reducing companies' exposure to unwarranted enforcement actions. For their part, the immigration agencies must seek the assistance of business in better understanding each industry's customary hiring practices, in identifying business practices that are out of the ordinary (and may thus require additional scrutiny), and in devising ways to perform their responsibilities more effectively. Such negotiated rule-making would accord with President Clinton's recent regulatory reform guidelines, which called on "all regulators to . . . create grass-roots partnerships with the people who are subject to [their] regulations and to negotiate rather than dictate wherever possible" (Office of the Federal Register 1995b:278-82).

THE "BODY SHOP" PROBLEM

One place to start a business-government dialogue might be by focusing on the implications of increasing corporate trends toward flexible staffing, particularly in high-technology sectors. In the name of efficiency, many corporations are moving away from maintaining large, permanent workforces and toward acquiring the services of technically skilled workers as and when needed. This has led to a huge and extremely diverse flexible-staffing industry that includes labor contractors, outsourcing firms, project management firms, and consultants (not to mention primary employers themselves who hire employees directly to meet specific short-term needs and then lay them off once the need is met). The nature of this flexible-staffing industry has created a major philosophical and regulatory "black hole" that in many ways threatens traditional relationships between business and labor.

In terms of immigration, the growth of the flexible staffing industry raises new and serious questions regarding prevention of abuses. It is now quite obvious that a large share of the most egregious violations of both letter and spirit of regulations governing temporary work-related admissions is committed by labor contractors—sometimes called "body shops"—who offer staffing flexibility to employers by taking charge of recruiting and importing foreign workers, often from low-wage countries. These violations include undercutting prevailing wages, creating oppressive employment contract terms, and refusing to invest in recruiting and training available U.S. workers. Industry must recognize its responsibility to work with government to develop ways to curb such predatory practices. At the same time, the DOL and the INS must come to grips with the reality and the benefits that the flexible-staffing industry provides.

PROTECTIONS FOR U.S. WORKERS

Any meaningful re-crafting of current policy requires an understanding that the admission of immigrants and the advancement of the interests of U.S. workers, especially professionals, are not mutually exclusive goals. Indeed, when immigrants have been carefully selected on the basis of their demonstrated qualities and skills—and realistic protections of sensitive sectors of the U.S. workforce are put in place—both goals can be achieved.

It is true that immigrant labor has probably moderated wage inflation among U.S. engineers, scientists, and other highly qualified professionals. This has provided U.S. business with a key competitive advantage internationally, thus helping them to prosper and, in the long run, to create more and better jobs. Nevertheless, U.S. professional workers have a right to expect to compete on equal terms with foreign-born professionals.

Therefore, we have proposed a number of protections to ensure a level playing field for U.S. workers. First, on the issue of wages, we propose a realistic way of setting proper total compensation packages that removes the attractiveness of foreign professionals on the ground that they are cheaper than U.S. ones. We have no doubt that U.S. workers can out-compete foreign competition most of the time—as long as we remove the most perverse incentive we now permit: the ability to obtain foreign workers at a significant discount. Under our proposals, employers would have to attest that they are paying foreign workers prevailing wages that *include* the value of all the benefits received by their U.S. workers—bonuses, health insurance, vacation, etc.

In addition to strengthening wage attestation requirements, we propose limiting the stay of H-1 temporary workers to three years, rather than the six years that are permitted under the present system, and strengthening their ability to bargain with employers by allowing them to change jobs after the first year if they are offered higher wages by another employer. This will minimize employers' incentive and ability to exploit foreign workers by paying them less than comparably situated U.S. workers.

Finally, under our proposals, the DOL and INS would get additional responsibilities—and funding—for compliance oversight, which is virtually absent from the current system.

Our proposals would also help to limit entry of all but the most talented foreign workers. First of all, the threshold for the points test we propose would virtually eliminate the entry of low-skilled immigrants and temporary workers who are most likely to compete with U.S. workers for entry-level jobs. Second, we propose protecting some of our most vulnerable professionals, young college graduates, by, among other things, requiring immigrant workers to have at least three years of relevant work experience. Moreover, our proposal generally ratchets the system's qualification requirements upward, so that those fewer immigrants who will be selected will create even more jobs for others, not take them away. Third, we suggest more stringent requirements for making sure that temporary workers who come in under some non-immigrant visas actually leave the country when their visas expire. We would also forbid them readmission for at least a year. Fourth, we would require employers to recruit according to industry standards, something they are not now required to do for temporary workers. In particular, we propose that contracting with "body shops" that supply a predominantly foreign workforce would not be considered a "customary" recruitment practice for purposes of wage attestation. Taken together, these requirements would create very significant new protections for U.S. workers by breaking the cycle of certain jobs being permanently filled by foreign workers.

Most important of all, our proposals move us toward a redefinition of the concept of protection for U.S. workers, one that is fundamentally consistent with American principles of offering equal opportunity and of rewarding investments in one's human capital. Demagoguery aside, there is no argument among economists regarding the job-multiplying effects associated with the employment of highly endowed individuals—the very people who are explicity favored under our immigrant-selection proposals. The competitiveness argument is equally simple: given roughly equal levels of technology and capitalization, a firm can extract more "value" from the same amount of labor by a better qualified worker than by a less qualified one.

Thus, U.S. business *should* have access to the best qualified individuals for their key job openings. Such people can help to produce "first-to-market" products in such knowledge-intensive industries as pharmaceuticals, telecommunications, sophisticated aircraft and space technology, or computer hardware and software, which in turn multiplies economic opportunities and jobs exponentially. If the "product" becomes even just one of an industry's standards, rather than *the* industry standard—and even when a product's "edge" over another product is relatively small—the returns become larger still as repetitions become cheaper, dependent products are spawned, and inertia begins to take hold. In certain products, such as computer operating systems, first-to-market advantages are even starker. Even if a better system gets developed but comes to market late, it will generate a fraction of the interest it might have generated otherwise because the earlier system is already established and both users and the hardware industry are already geared toward that system—a process known as the "network effect." In other words, momentum alone often carries a product forward and allows a few companies to dominate a market. For time-dependent products and processes, first-to-market may not guarantee setting the standard, but it *does* offer a distinct advantage and extraordinary job-multiplying potential for *all* workers (see also Keely 1995).

Thus, hiring talented foreigners at market wages is in the long-term interest of U.S. workers. For instance, although some U.S. workers with a Ph.D. in the sciences might "benefit" in the short term from reductions in the employment of foreign-born Ph.D. professionals, in the longer term, we as a country would be poorer because overall opportunities for both U.S. scientists and science would shrink.[112] Indeed, when immigrants are chosen carefully, based on their demonstrated qualities and skills, they create additional economic opportunity and more and better jobs for everyone.

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[112] Any problem with "oversupply" of foreign nationals in graduate science and engineering programs should be dealt with by encouraging more Americans to enter those

CONCLUSION

We have tried to fashion a balanced approach to economic-stream immigration that will serve the United States well into the next century—an approach that emphasizes managing the immigration gate with rules that simultaneously help businesses succeed and remain competitive in the global economy by facilitating access to the best foreign talent, help U.S. workers succeed by creating opportunities for more and better jobs while protecting them from unfair competition, and help immigrants succeed through a fair return on their investments in their own skills and expertise. This approach has always been a large part of America's secret of success. It should continue to be so.

Our approach emphasizes clear rules and predictable outcomes. The vast majority of our corporate citizens want to and do play by the rules. Instead of asking the government to divine when an employer's need is authentic or to tell a firm that it cannot hire the most qualified job applicant (an argument the government neither should make nor can win), we propose to ask the government to do things it can and should do. Under our system, employers could obtain the qualified workers they need in a timely manner. Jurisdictional issues would be clarified, with the INS given clear responsibility as the lead agency in immigration matters. And the hodgepodge of intrusive, often conflicting government regulations would be simplified. The INS should not have to adjudicate nearly as many work-related non-immigrant visa petitions as its does now; the State Department should have to issue fewer non-immigrant visas; and the DOL, freed from the ultimately fruitless task of labor certification, could concentrate its efforts on credible and effective audits, investigations of those who abuse the system, and enforcement.

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fields, by getting young people excited about sciences when they are in elementary and secondary school, by making more public funds available for fellowships and traineeships so that more Americans can pursue advanced degrees—an approach that is in the opposite direction from where the present Congress is going—and by persuading American business and foundations to develop more long-term relationships, even partnerships, with our research universities.

Most important, immigrants would be seen for what they are—prospective members of American society in the fullest sense. As such, they would be chosen not only on the basis of a specific offer of a job that may not hold very long, but also on the basis of characteristics that are likely to ensure long-term contributions to the economy: age, education, language ability, work experience, and skills. An adaptation of the point systems used by Canada and Australia offers a flexible and straightforward vehicle for accomplishing this end.

Listening to the siren songs of restriction and protectionism will only hobble America's efforts to do better by all of us. Trade barriers are falling—in large part because of U.S. initiatives. Technology, like capital, recognizes neither borders nor nationality. Individual initiative and talent are now the most valuable global resource. We need an immigration system that will guarantee us access to those who have these attributes and are willing to put them to work for the country, while giving the government the tools to manage the system with rules that make sense. Only then will we have an immigration system that is truly in the national interest.

REFERENCES

American Immigration Lawyers Association (AILA). 1995a. *Department of Labor Processing Times in Days.* AILA Monthly Mailing (March):180.

————. 1995b. *INS Processing Time Reports.* AILA Monthly Mailing (May):329-331.

Australian Department of Immigration & Ethnic Affairs (DIEA). 1995. *Population Flows: Immigration Aspects.* Prepared by Kosmas Tsokhas, Joanne Constantinides, Jan Cleland, and Andrew Tarte, Migration Policy Branch (January). Australian Capital Territory: DIEA.

Booz, Allen and Hamilton, Inc. 1980. *Study of the Permanent Labor Certification Program Administered by the U.S. Department of Labor and State Employment Security Agencies.* Report prepared for the Employment and Training Administration, U.S. Department of Labor under contract No. 20-24-79-37 (September). Washington, D.C.

Brimelow, Peter. 1995. *Alien Nation: Common Sense about America's Immigration Disaster.* New York: Random House.

Bruening, Thomas M. 1993. *Labor Market Tests for Foreign Workers: A Critique of the Current Processes.* Paper prepared for and on file with the International Migration Policy Program of the Carnegie Endowment for International Peace.

Business Week. 1992. Christopher Farrell. "America Needs Protection from the Protectionists." February 10:31.

————. 1994. James E. Ellis. "Industry Outlook: Introduction: Why Overseas? 'Cause That's Where the Sales Are." January 10:62-63.

Carnegie Council on Adolescent Development. 1989. *Turning Points: Preparing American Youth for the 21st Century.* Report of the Task Force on Education of Adolescents (June). Washington, D.C.

Carnegie Endowment for International Peace, International Migration Policy Program. 1994. "A Summary Analysis of ETA Labor Certification Data." Study prepared by Scott Came. On file with the International Migration Policy Program (October). Washington, D.C.

Carnegie Forum on Education and the Economy. 1986. *A Nation Prepared: Teachers for the 21st Century.* Report of the Task Force for Teaching as a Profession (May). Washington, D.C.

Centro de Estudios Puertorriqueños. 1979. *Monthly Review. Report of the History Task Force.* New York: Centro de Estudios Puertorriqueños

Commission on Workforce Quality and Labor Market Efficiency. 1989. *Investing in People: A Strategy to Address America's Workforce Crisis.* (September.) Washington, D.C.: U.S. Department of Labor

Casals and Associates. 1994. *Evaluation of Pilot Foreign Student Employment Program.* A report for the Division of Immigration Policy & Research, Bureau of International Labor Affairs, U.S. Department of Labor (March). Washington, D.C.

Citizenship and Immigration Canada. 1994a. *A Broader Vision: Immigration and Citizenship Plan 1995-2000 Annual Report to Parliament.* (IM-306-10-94.) Quebec: Minister of Supply and Services Canada.

Cohen, Malcolm S. 1990. *Study on the Feasibility of Using Labor Market Information for Alien Labor Certification Determination.* Report to the Employment and Training Administration, U.S. Department of Labor under Contract No. 99-9-4781-75-072-01 (April 23). Washington, D.C.

Cohen, Malcolm S. and Arthur R. Schwartz. 1982. *Methodology for Determining Whether There Are Sufficient Workers Available in Various Occupations—An Aid in the Certification of Immigrants.* A Study funded by the Employment and Training Administration, U.S. Department of Labor (August). Washington, D.C.

Council of Economic Advisors. 1995. *Economic Report of the President.* Washington, D.C.: U.S. Government Printing Office.

Crain's Detroit Business News. 1992. "Computing an Unfair Advantage?" June 29:21.

Davis, Todd M. (ed.). 1995. *Open Doors: 1994/1995 Report on International Educational Exchange.* New York: Institute of International Education (IIE).

Farley, Reynolds (ed.). 1995. *State of the Union, America in the 1990s, Volume One: Economic Trends.* New York: Russell Sage Foundation.

Frank, Robert H. and Philip J. Cook. 1995. *Winner-Take-All Society.* New York: Free Press

Griffith, David, Monica L. Heppel, and Luis R. Torres. 1994. *Labor Certification and Employment Practices in Selected Low-Wage/Low-Skill Occupations: An Analysis from Worker and Employer Perspectives.* Inter-American Institute on Migration and Labor (February). Washington, D.C.

Herzenberg, Stephen A., John Alic, and Howard Wial, with Frank Gallo, Margaret Hilton and Ken Freeman. 1996. *Better Jobs for More People: A New Deal for the Service Economy.* New York: 20th Century Fund (forthcoming).

Howell, David R. and Elizabeth J. Mueller. 1996. *Skill Mismatch, Labor Market Restructuring and the Changing Economic Status of Foreign Born Workers in New York City and Los Angeles.* Paper prepared for the Social Science Research Council Conference on Immigration, Florida, January 17-21.

Hudson Institute. 1987. *Workforce 2000: Work and Workers for the 21st Century.* Indianapolis: Hudson Institute, Inc.

Immigration Nursing Relief Advisory Committee. 1995. *Report to the Secretary of Labor on the Immigration Nursing Relief Act of 1989.* (March.) Washington, D.C.

International Herald Tribune. 1995. "Intel to Spend $3 billion on New Factories." October 21-22:9.

Karnuth v. United States *ex rel.* Albro, 279 U.S. 231 (1929).

Keely, Charles. 1995. *Letter to Demetrios G. Papademetriou."* On file with the International Migration Policy Program, Carnegie Endowment for International Peace (October 3). Washington, D.C.

Kominski, Robert and Rebecca Sutterlin. 1992. *What's it Worth? Education Background and Economic Status.* Current Population Reports, Household Economic Studies No. P70-32. U.S. Bureau of the Census. Washington, D.C.: U.S. Government Printing Office.

Kutscher, Ronald E. 1987. *Overview and Implications of the Projections to 2000,* in *Monthly Labor Review,* Vol. 110, No. 9 (September).

————. 1989. *Projections Summary and Emerging Issues,* in *Monthly Labor Review,* Vol. 112, No. 11 (November).

————. 1991. *New BLS Projections: Findings and Implications,* in *Monthly Labor Review,* Vol. 114, No. 11 (November).

————. 1993. *Historical Trends, 1950-92, and Current Uncertainties,* in *Monthly Labor Review,* Vol. 116, No. 11 (November).

————. 1995. *Employment Outlook: 1994-2005. Summary of BLS Projections to 2000,* in *Monthly Labor Review,* Vol. 118, No. 11 (November).

LeMay, Michael C. 1994. *Anatomy of a Public Policy: The Reform of Contemporary American Immigration Law.* New York: Greenwood (Praeger Publishers).

Marcotte, David. 1994. *Skills, Wages, and Careers: Essays on the Emerging Economy and its Implications for Education and Training Policies.* Unpublished Ph.D. dissertation, School of Public Affairs, University of Maryland.

Marshall, Ray. 1995. *The Global Job Crisis,* in *Foreign Policy,* No. 100 (Fall).

Matter of Hira, 11 I. & N. Dec. 824 (Board of Immigration Appeals 1965, 1966, Attorney General. 1966).

Minneapolis Star Tribune. 1993. Josephine Marcotty. "Therapists from Poland Bargained for more in the U.S." June 11: 1A.

Minkin, Barry H. 1995. *Future in Sight* (New York: Macmillan) as excerpted in "A More Shocking Future". *Hemispheres,* November:47-52.

Mishel, Lawrence and Jared Bernstein. 1993. *The State of Working America.* (1992-1993 Edition) Armonk, NY: Economic Policy Institute.

Moss Kanter, Rosabeth. 1995a. World Class: Thriving Locally in the Global Economy." New York: Simon and Schuster.

———. 1995b. *Thriving Locally in the Global Economy,* in *Harvard Business Review,* September-October: 151-160.

Myint & Buntua, Certified Public Accountants and Management Consultants. 1996. *Puerto Rico Department of Labor and Human Resources, Hato Rey, Puerto Rico. Report on Performance and Financial Audit of Migrant Farmworker Program, July 1991 to March 31, 1995.* Audit performed under contract to the Office of the Inspector General, U.S. Department of Labor. Audit Report No. 18-96-005-03-365 (February 27).

National Center on Education and the Economy. 1990. *America's Choice: High Skills or Low Wages.* Report of the Commission on the Skills of the American Workforce (June). Washington, D.C.

National Commission for Employment Security (NCES). 1995. *Declining Job Security and the Professionalization of Opportunity.* Washington, D.C.: NCES.

New York Times. 1991. Barnaby J. Feder. "Sugar Growers Seek Cleaner Image." December 3:D1.

North, David S. 1971. *Alien Workers: A Study of the Labor Certification Program.* Report prepared for the U.S. Department of Labor under Contract No, 81-11-71-08 (August). Washington, D.C.

North, David S. and W.G. Weissart. 1974. *Immigration and the American Labor Market.* Manpower Research Monograph No. 31. Washington, D.C.: U.S. Department of Labor.

Office of the Federal Register, National Archives and Records Administration. 1995a. *Weekly Compilation of Presidential Documents.* February 7:199-204. Washington, D.C.: U.S. Government Printing Office.

———. 1995b. *Weekly Compilation of Presidential Documents.* February 21:178-182. Washington, D.C.: U.S. Government Printing Office.

Organisation for Economic Co-operation and Development (OECD). 1991. *Migration: The Demographic Aspects.* Paris: OECD.

Papademetriou, Demetrios G. 1990. *Memorandum to Robert Bostick, Roland G. Droitsch, Gary B. Reed, Ray Uhalde, Thomas Bruening and John Fraser Re: Review of the Cohen Report.* Bureau of International Labor Affairs, U.S. Department of Labor (November 9). Washington, D.C.

————. 1994. *International Migration in North America: Issues, Policies, Implications* in *International Migration: Regional Processes and Responses.* Geneva: UN Economic Commission for Europe and UN Population Fund.

————. 1996. *Whither European Integration?: Migration and Related Issues.* Washington, D.C.: Carnegie Endowment for International Peace (forthcoming).

Papademetriou, Demetrios G., Robert L. Bach, Kyle Johnson, Roger G. Kramer, Briant Lindsay Lowell and Shirley Smith. 1989. *The Effects of Immigration on the U.S. Economy and Labor Market.* Report No. 1. Washington, D.C.: Division of Immigration Policy and Research, Bureau of International Labor Affairs, U.S. Department of Labor.

Papademetriou, Demetrios G. and B. Lindsay Lowell. 1991. *Immigration Reform and the Skill Shortage Issue,* in *Labor Law Journal,* Vol. 42, No. 8 (August):520-527.

Papademetriou, Demetrios G. and Kimberly A. Hamilton. 1995. *Managing Uncertainty: Regulating Immigration Flows in Advanced Industrial Countries.* Washington, D.C.: Carnegie Endowment for International Peace.

———. 1996. *Converging Paths to Restriction: French, Italian and British Responses to Migration.* Washington, D.C.: Carnegie Endowment for International Peace.

Papademetriou, Demetrios G. with Maryam Kamali Miyamoto. 1996. *German Immigration Policy: A Study in Ambiguity.* Washington, D.C.: Carnegie Endowment for International Peace (forthcoming).

Papademetriou, Demetrios G. and Kate Nahapetian. 1996. *Ingredients of Change: Australian Immigration Policy.* Washington, D.C.: Carnegie Endowment for International Peace (forthcoming).

Perrin Towers and the Hudson Institute. 1990. *Workforce 2000. Competing in a Seller's Market: Is Corporate American Prepared?* A survey report.

Price Waterhouse. 1990. *F-1 Labor Market Study.* Report prepared under Contract to the U.S. Immigration and Naturalization Service.

Quinn, James Brian. 1992. *Intelligent Enterprise, A Knowledge and Service Based Paradigm for Industry.* New York: Free Press.

Reich, Robert. 1991. *The Work of Nations.* New York: A.A. Knopf.

Research and Evaluation Associates, Inc. 1990. *Study of the Permanent Alien Labor Certification Program.* Prepared for the Employment and Training Administration, U.S. Department of Labor under Contract No. 99-9-3314-75-056-01 (September 28). Washington, D.C.

Robin, Sophie and Claude Valentin Marie. 1995. *A Comparative Analysis of Legislation in Several European Countries Aimed at the Illegal Employment of Foreigners.* Report prepared for the Working Party on Migration, Organisation for Economic Co-Operation and Development (June 13). Paris.

Rodino, Hon. Peter W. 1974. *The Impact of Immigration on the American Labor Market,* in *Rutgers Law Review,* Vol. 27, No. 2:245-274.

San Francisco Chronicle. 1992. John Eckhouse. "Programmers Losing Out, Immigration Loophole lets Foreigners take U.S. Jobs." July 6:B1.

Smith, Lamar. 1995. *Letter to Secretary of Labor Robert Reich.* On file at the International Migration Policy Program, Carnegie Endowment for International Peace (May 11). Washington, D.C.

U.S. Bureau of the Census. 1994. *Statistical Abstracts of the United States: 1994.* 114th Edition (September). Washington, D.C.: U.S. Government Printing Office

U.S. Congress. 1885. *Contract Labor Act of 1885.* (Public Law 48-52.) 48th Congress. 23 Stat. 332 (February 26). Washington, D.C.: U.S. Government Printing Office.

————. 1986. *Immigration Reform and Control Act of 1986.* (Public Law 99-603). 99th Congress. 100 Stat. 3359 (November 6). Washington, D.C.: U.S. Government Printing Office.

————. 1989. *Immigration Nursing Relief Act of 1989.* (Public Law 101-238). 101st Congress. 103 Stat. 2099 (December 18). Washington, D.C.: U.S. Government Printing Office.

————. 1990. *Immigration Act of 1990.* (Public Law 101-549). 101st Congress. 104 Stat. 4978 (November 29). Washington, D.C.: U.S. Government Printing Office.

————. 1995. *Immigration and Nationality Act (Reflecting Laws Enacted as of May 1, 1995). With Notes and Related Laws.* Committee Print prepared for the use of the Committee on the Judiciary of the House of Representatives (104th Congress, 1st Session). 10th Edition (May). Washington, D.C.: U.S. Government Printing Office

U.S. Congress, Office of Technology Assessment (OTA). 1992. *U.S.-Mexico Trade: Pulling Together or Pulling Apart?* Report No. ITE-545 (October). Washington, DC: U.S. Government Printing Office.

U.S. Department of Commerce. 1994. *Survey of Current Business.* Washington, D.C.: U.S. Government Printing Office.

U.S. Department of Labor (DOL). 1990. *Options Paper on Independent Immigration.* Memorandum to the Secretary of Labor from the Immigration Policy Task Force (August 30). Washington, D.C.

———. 1991. *Revised Handbook for Analyzing Jobs.* Washington, D.C.: U.S. Government Printing Office.

———. 1994. *Report on the American Workforce.* Washington, D.C.: U.S. Government Printing Office.

———. 1995a. General Administration Letter No. 4-95, Interim Prevailing Wage Policy for Nonagricultural Immigration Programs (May 18), reported on and reproduced in *Interpreter Releases* Vol. 72, No. 24 (June 26):848-855.

———. 1995b. *Immigration News Newsletter: An ETA/SESA Publication.* Detroit: U.S. Department of Labor and the Michigan Employment Security Commission (July).

———. 1995c. *Reengineering of Permanent Labor Certification Program: Solicitation of Comments.* Notice; request for comments from the Employment and Training Administration (July 17), reported on and reproduced in *Interpreter Releases* Vol. 72, No. 28 (July 24):993.

———. 1995d. *Analysis of the Kansas City Star Article Regarding Foreign Labor Programs (Article dated July 16, 1995).* Memorandum to the Secretary of Labor from the Employment & Training Administration (July 19). Washington, D.C.

U.S. Department of Labor (DOL) and U.S. Immigration & Naturalization Service (INS). 1994. *Report to the Congress. An Evaluation of the Pilot Program of Off-Campus Work Authorization for Foreign Students (F-1 Nonimmigrants).* Report prepared under §221(b) of the Immigration Act of 1990 (P.L. 101-649, November 29, 1990), as Amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (P.L. 102-232, December 12, 1991). (August 10.) Washington, D.C.: U.S. Government Printing Office.

U.S. Department of State, Bureau of Consular Affairs. 1993. *Visas: Documentation of Nonimmigrants under the Immigration and Nationality Act, as Amended; Temporary Visitors. Notice of Proposed Rulemaking,* as published in the *Federal Register,* Vol. 58, No. 141 (July 26):40024-40030.

U.S. General Accounting Office. 1975. *Administration of the Labor Certification Program Should be Strengthened.* Rep. No. B125051. Washington, D.C.: U.S. Government Printing Office.

———. 1990. *U.S. Information Agency: Inappropriate Uses of Educational and Cultural Exchange Visas.* Rep. No. GAO-61 (February). Washington, D.C.: U.S. Government Printing Office.

U.S. House of Representatives. 1952. *Revising the Laws Relating to Immigration, Naturalization and Nationality (to accompany H.R. 5678).* Rep. No. 1365, 82nd Congress, 2nd Session. Washington, D.C.: U.S. Government Printing Office.

———. 1990a. "Immigration Act of 1989 (Part 3)." Joint Hearings before the Subcommittee on Immigration, Refugees, and International Law of the Committee on the Judiciary and the Immigration Task Force of the Committee on Education and Labor. U.S. House of Representatives on S.358, H.R.672, H.R.2448, H.R.2646, and H.R.4165. Committee on the Judiciary Serial No. 21; Committee on Education and Labor Serial No. 101.74, 101st Congress, 2nd Session (Feb. 21, March 1, 7, 13, 14). Washington, D.C.; U.S. Government Printing Office.

———. 1990b. *"Family Unity and Employment Opportunity Immigration Act of 1990, Report together with Dissenting Views (to accompany H.R. 4300).* Rep. No. 101-723, Part 1, 101st Congress, 2nd Session (September 19). Washington, D.C.: U.S. Government Printing Office.

U.S. Immigration & Naturalization Service. 1994. *1993 Statistical Yearbook of the Immigration and Naturalization Service.* (October.) Washington, D.C.: U.S. Government Printing Office.

U.S. Senate. 1950. *The Immigration and Naturalization Systems of the United States.* Rep. No. 1515, 81st Congress, 2nd Session. Washington, D.C.: U.S. Government Printing Office.

———. 1989. "Immigration Act of 1989." Report together with Additional and Minority Views (to accompany S. 358). Rep. No. 55, 101st Congress, 1st Session. Washington, D.C.: U.S. Government Printing Office.

United States Trade Representative. 1994. *General Agreement on Trade in Services. The United States of America: Schedule of Specific Commitments."* GATS/SC/90 (April 15). Washington, D.C.: U.S. Government Printing Office.

Washington Post. 1995. "Job Change: The Common-Sense View is True." Letter to Editor from Anthony P. Carnavale. January 10:A16.

Yale-Loehr, Stephen. 1991. *Understanding the Immigration Act of 1990.* Washington, D.C.: Federal Publications, Inc.

ANNEX A

THE INTERNATIONAL MIGRATION POLICY PROGRAM'S STUDY GROUP ON THE SELECTION OF SKILLED IMMIGRANTS

(December 1993—June 1995)

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Mr. Papademetriou has published extensively in the United States and abroad on the immigration and refugee policies of the United States and other advanced industrial societies, the impact of legal and illegal immigration on the U.S. labor market, and the relationship between international migration and development. Prior to joining the Endowment, Mr. Papademetriou served as Director of Immigration Policy and Research at the U.S. Department of Labor and chaired the Secretary of Labor's Immigration Policy Task Force. Mr. Papademetriou has also served as Executive Editor of the International Migration Review. He has taught at American University, Duke University, the University of Maryland, and the Graduate Faculty of the New School of Social Research.

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Mr. Yale-Loehr has taught international trade and immigration law at the Georgetown University Law Center and is the author of numerous legal publications. He currently co-authors *Immigration Law and Practice*, a twelve-volume reference work that is updated quarterly and considered the leading immigration law treatise in the United States.

THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

The Carnegie Endowment for International Peace was established in 1910 in Washington, D.C., with a gift from Andrew Carnegie. As a tax-exempt operating (not grant-making) foundation, the Endowment conducts programs of research, discussion, publication, and education in international affairs and U.S. foreign policy. The Endowment publishes the quarterly magazine, *Foreign Policy*.

Carnegie's senior associates—whose backgrounds include government, journalism, law, academia, and public affairs—bring to their work substantial first-hand experience in foreign policy through writing, public and media appearances, study groups, and conferences. Carnegie associates seek to invigorate and extend both expert and public discussion on a wide range of international issues, including worldwide migration, nuclear nonproliferation, regional conflicts, multilateralism, democracy-building, and the use of force. The Endowment also engages in and encourages projects designed to foster innovative contributions in international affairs.

In 1993, the Carnegie Endowment committed its resources to the establishment of a public policy research center in Moscow designed to promote intellectual collaboration among scholars and specialists in the United States, Russia, and other post-Soviet states. Together with the Endowment's associates in Washington, the center's staff of Russian and American specialists conduct programs on a broad range of major policy issues ranging from economic reform to civil-military relations. The Carnegie Moscow Center holds seminars, workshops, and study groups at which international participants from academia, government, journalism, the private sector, and nongovernmental institutions gather to exchange views. It also provides a forum for prominent international figures to present their views to informed Moscow audiences. Associates of the center also host seminars in Kiev on an equally broad set of topics.

The Endowment normally does not take institutional positions on public policy issues. It supports its activities principally from its own resources, supplemented by nongovernmental, philanthropic grants.

THE INTERNATIONAL MIGRATION POLICY PROGRAM

The movement of people has emerged as one of the critical issues facing the international community. Unless managed firmly but thoughtfully, migrations will pose critical challenges for democratic order and for international peace and stability. Against this backdrop, the International Migration Policy Program has developed a reputation as a leading source of expert analysis and policy ideas, as it focuses on bridging the worlds of immigration research and policy making and bringing an informed, independent voice to immigration policy debates here and abroad. The Program seeks to enhance the informed public's understanding of migration, refugee, and related topics and to shape the way policymakers think about and respond to these policy challenges. It does so by convening a series of breakfast briefings, luncheon seminars, policy roundtables, and study groups. Program staff also engage in an active schedule of writing and public speaking designed to promote a thoughtful and informed dialogue on this increasingly volatile policy area.

The Program also has convened an independent bilateral body, the U.S.-Mexico Consultative Group, to monitor and report on progress on cooperation in the areas of migration and labor within the NAFTA framework. Composed equally of U.S. and Mexican senior members of government, research, academic and advocacy organizations, the Consultative Group will candidly address the most intractable problems of border management and labor rights and standards.

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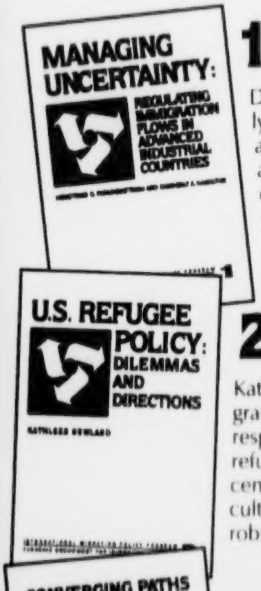
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